Supreme Court, U.S.
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No. 09-1569

IN THE

Supreme Court of the United States

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE, et al.,

Petitioners,

—v.—

WEST CARIBBEAN AIRWAYS, a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When 28 U.S.C. §1369 of the Multi-Party Multi-Forum Trial Jurisdiction Act (the "MMTJA") required that all claims arising from a mass accident be consolidated into a single, federal Multi-District Litigation proceeding, did the Eleventh Circuit Court of Appeals commit reversible error in affirming the District Court's Order which denied Petitioners' request for Rule 60(b)(5) and (6) relief and prevented them from joining a subsequently established MMTJA proceeding established by the Crew of the same plane crash in the District Court?

2. Did the Eleventh Circuit Court of Appeals commit reversible error by refusing to grant victims of the same aviation disaster access to similar relief in the same District Court by allowing the District Court to segregate the claims brought on behalf of the Passengers and Crew of the same doomed flight into separate proceedings, by refusing to notify an MDL Panel and by then refusing to grant Petitioners relief from a *forum non conveniens* dismissal after the District Court denied dismissal of the Crew on *forum non conveniens* grounds?

LIST OF PARTIES

Petitioners:

Petitioners are the representatives of 102 of the 152 passengers who perished in the crash of Flight 708 on August 16, 2005. Each Petitioner is a natural person and resident of the Republic of France, Department of Martinique. The list of parties are contained in a separate letter filed with the Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit in this action.

OPINION BELOW

The Appeals Court decision below is a "Do Not Publish" decision reprinted in the Appendix at App. 1.

BASIS FOR JURISDICTION IN THIS COURT

Petitioners invoke certiorari jurisdiction pursuant to 28 U.S.C. §1254(1).

The Eleventh Circuit Court of Appeals rendered its opinion on March 25, 2010. This Petition is timely filed within 90 days of March 25, 2010.

The Eleventh Circuit Court of Appeals' decision conflicts with *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975). The Eleventh Circuit Court of Appeals' decision below contrued the MMTJA as merely a jurisdictional act and significantly curtailed the Congressional intent behind the enactment of this significant catastrophic disaster legislation by denying Petitioners the full benefit and due process of the statutory scheme passed by Congress for their benefit.

Pursuant to Supreme Court Rule 14 1(e), Petitioner provides the following specific information:

(i) Date of judgment or order sought to be reviewed was entered:

March 25, 2010, by the United States Court of Appeals for the Eleventh Circuit

(ii) Date of any order respecting rehearing/ extension of time:

None

(iii) Rule 12.5 considerations:

Not applicable to this Petition

(iv) Statutory provision conferring jurisdiction:

28 U.S.C. §1254(1)

(v) Rule 29.4 statement:

Not applicable to this Petition

STATUTE INVOLVED

28 U.S.C. §1369. Multiparty, multiforum jurisdiction:

(a) In General.—The district courts shall have original jurisdiction of any civil action involving minimal diversity between adverse parties that arises from a single accident, where at least 75 natural persons have died in the accident at a discrete location, if—

(1) a defendant resides in a State and a substantial part of the accident took place in another State or other location, regardless of whether that defendant is also a resident of the State where a substantial part of the accident took place;

(2) any two defendants reside in different States, regardless of whether such defendants are also residents of the same State or States; or

(3) substantial parts of the accident took place in different States.

(b) Limitation of Jurisdiction of District Courts.—The district court shall abstain from hearing any civil action described in subsection (a) in which—

(1) the substantial majority of all plaintiffs are citizens of a single State of which the primary defendants are also citizens; and

(2) the claims asserted will be governed primarily by the laws of that State.

(c) Special Rules and Definitions.—For purposes of this section—

(1) minimal diversity exists between adverse parties if any party is a citizen of a State and any adverse party is a citizen of another State, a citizen or subject of a foreign state, or a foreign state as defined in section 1603 (a) of this title;

(2) a corporation is deemed to be a citizen of any State, and a citizen or subject of any foreign state, in which it is incorporated or has its principal place of business, and is deemed to be a resident of any State in which it is incorporated or licensed to do business or is doing business;

(3) the term "injury" means—

(A) physical harm to a natural person; and

(B) physical damage to or destruction of tangible property, but only if physical harm described in subparagraph (A) exists;

(4) the term "accident" means a sudden accident, or a natural event culminating in an accident, that results in death incurred at a discrete location by at least 75 natural persons; and

(5) the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(d) Intervening Parties.—In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.

(e) Notification of Judicial Panel on Multidistrict Litigation.—A district court in which an action under this section is pending shall promptly notify the judicial panel on multidistrict litigation of the pendency of the action.

STATEMENT OF THE CASE

The cornerstone of American Justice is our notion of Fundamental Fairness and that everyone who enters an American courtroom will be treated fairly, equally and afforded the full due process of the law. This did not happen below as the personal representatives of the Colombian Crew of Flight 708 were allowed to bring and maintain an action in the District Court while the claims brought by the personal representatives of the French Passengers who also perished on the flight were dismissed on *forum non conveniens* grounds. The instant is a case of first impression before this Court involving the Multi-Party Multi-Forum Trial Jurisdiction Act ("MMTJA"), 28 U.S.C. §1369, passed by Congress in the wake of the September 11, 2001 attacks in New York City. This action will also be the first of many proceedings which will render the MMTJA meaningless if the lower Courts' rulings are allowed to stand. With the MMTJA applicable only to litigation involving catastrophic accidents resulting in the deaths of 75 or more people, its construction will have significant ramifications for the victims of future disasters beyond the instant case. In 2002 Congress enacted the MMTJA as part of a comprehensive scheme to consolidate all claims arising from a catastrophic accident into a single federal proceeding with the intent of affording victims of the same disaster uniform redress and results. But, the Courts below have misinterpreted the MMTJA as "simply" another jurisdictional act and they have disregarded specific provisions of the MMTJA which would have afforded Petitioners the same relief granted

the Crew. The end result was the creation of multiple proceedings in different countries to adjudicate the related claims brought on behalf of the victims of the same aviation disaster. Such a result was completely contrary to the very purpose and spirit of the MMTJA. By reducing the MMTJA to "simply" a jurisdictional act, the Courts below emasculated the MMTJA and denied Petitioners their day in Court while allowing the Crew to proceed, producing exactly the type of non-uniform results that the MMTJA was enacted to prevent.

On August 16, 2005, West Caribbean Airlines ("WCA") Flight 708 fell into a nosedive and incinerated on impact near Maracaibo, Venezuela. All 152 Passengers and the 8 crew members were killed. Petitioners represent 102 of the passenger representatives who on December 4, 2006 filed Montreal Convention claims against the carrier, Newvac, in the District Court in and for South Florida where Newvac's home office was located. Since there were two other smaller groups of passengers who also filed lawsuits, the District Court consolidated all passenger cases into one proceeding ("The Passenger Case"). Although the District Court has stated that it was at all times exercising 28 U.S.C. §1369 jurisdiction [App. 1, App. 2], the District Court never notified the Judicial Panel on Multi-District Litigation of this mass accident despite the requirements of 28 U.S.C. §1369(e) to do so. In August of 2007, representatives of seven of the crew members also filed lawsuits in the Southern District of Florida. Approximately two weeks later, the crew case defendants moved to consolidate the crew cases while the crew moved to consolidate all claims

from Flight 708 into one proceeding. Despite the crew's advocacy for litigating their claims with the passengers in one unified proceeding for all claims of the Flight 708 victims, the District Court *separately* consolidated the seven crew members lawsuits into a second Flight 708 parallel proceeding ("The Crew Case").

After it established separate proceedings for the Passengers and Crew, the District Court then began treating each proceeding as independent and unrelated. On November 9, 2007, the District Court dismissed the Passenger Case for *forum non conveniens* [the "Passenger FNC Order"] and directed the Petitioners to litigate their claims in Martinique, France. On May 13, 2009, the same District Court denied a second *forum non conveniens* challenge to the Crew Case [the "Crew FNC Order"] and allowed the crew to proceed with their claims in the District Court which created the wrinkle in this case. Not only was it patently unfair to have dismissed the Passengers to Martinique while allowing the crew to litigate in the United States, but by allowing the Crew Members to remain, the District Court (and the Circuit Court) failed to acknowledge that the ruling which allowed the Crew to proceed in the District Court also established a 28 U.S.C. §1369 'anchor' MMTJA proceeding which then allowed every other person damaged as a result of the same accident to bring their claims, no matter the type or cause of action, into the one unified District Court proceeding, as Congress intended when it passed the MMTJA.

In light of the MMTJA and the Congressional intent behind its enactment, requiring claims from the same accident to be adjudicated together,

the District Court's exercise of jurisdiction over the Crew Member's litigation was an exceptional change in circumstances. It rendered the FNC dismissal of the Passenger claims contrary to 28 U.S.C. §1369 and therefore inequitable and unjust, justifying the grant of relief under Rule 60(b)(5) and (6). The rejection of FNC for the Crew drastically changed the circumstances surrounding the previous FNC dismissal of Petitioners' case because it, for the first time, established a §1369 action for all who died in the Flight 708 accident. This decision was significant because 28 U.S.C. §1369(d) grants those affected by a qualifying accident (or as here the decedents on board the plane) the right to immediate and mandatory[1] intervention into the §1369 proceeding.[2] This mandatory intervention under the statute extends even to those Petitioners "who could not have brought the claims in the District Court as an original matter" as the Petitioners were not able to do so as evidenced by their prior FNC dismissal.[3]

[1] 28 U.S.C. §1369 provides: "**(d) Intervening Parties.** In any action in a district court which is or could have been brought, in whole or in part, under this section, any person with a claim arising from the accident described in subsection (a) shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter."

[2] *See Congress and the Multiparty, Multiforum Trial Jurisdiction Action of 2002: Meaningful Reform or a Comedy of Errors*, Rafoth, A., 54 Duke L.J. 255, 257-260 (2004).

[3] The District Court was required to inform the MDL panel of the pending 28 U.S.C. §1369 proceeding involving Flight 708 either at filing or after disposing of this last FNC challenge to the Crew case, but the District court did not do

Once the Crew Members jurisdictionally established a §1369 proceeding in the District Court, Petitioners filed their Rule 60(b) Motion for Relief asking the District Court to grant relief from the prior FNC Order dismissing their case. Petitioners contended not only that the May 13, 2009 Crew FNC Order created a shift in circumstances surrounding the rendition of the Passenger FNC Order of dismissal, but also that the continued application of the Passenger FNC Order would be inequitable, inconsistent with the relief afforded to the Crew, and contrary to the MMTJA. As such, equitable relief under Rule 60(b)(5) and/or (6) was in Order and justified. Petitioners requested Rule 60(b) relief so they could then consolidate/intervene their Montreal Convention claims into the Crew's §1369 action. Pursuant to the broad language of §1369(d), as they could not advance their claims as an original proceeding, Petitioners urged the District Court to allow intervention and to consider case law predating the MMTJA which also favored the grant of relief under Rule 60(b)(5) and (6) in order to harmonize the remedies available to victims of the same disaster. The District Court ultimately rebuffed Petitioners when it determined that it did not have jurisdiction to grant relief and announced that even if it had jurisdiction, it still would treat victims of the same plane crash differently because the MMTJA was "simply" a jurisdictional statute. [App. 1, App. 2]. The Dis-

so. Neither did the District Court allow the Crew to consolidate into the Passenger case, nor did the District court allow Rule 60(b) relief of the previously dismissed Passenger Montreal claims so that the Passengers could intervene into the Crew members §1369 anchor proceeding.

trict Court never addressed the specific provisions of 28 U.S.C. §1369, raised by Petitioners, including whether an anchor proceeding was established, whether intervention was available, whether consolidation should have taken place or the intent of Congress behind the MMTJA. Ultimately, the District Court never elaborated as to why it denied Petitioners' their due process under the MMTJA.[4]

On review, the Eleventh Circuit Court of Appeals held that the District Court erred and that it had jurisdiction to entertain Petitioners' Motion for Rule 60(b) Relief. [App. 5]. But, the Eleventh Circuit nonetheless found harmless error and affirmed the remainder of the District Court's Order under review in its Opinion entered on March 25, 2010. It accepted the District Court's reasoning that the MMTJA "simply" provided a

[4] It was unfortunate that the District Court in its Order on Motion for 60(B) Relief felt that the Motion was meant to 'subvert' the Court's prior Order of dismissal of the Passenger Case but it was the District Court which chose to treat the Passengers and Crew differently. When the District Court denied FNC dismissal of the Crew Case, it established an anchor proceeding under §1369 which, by the very language included by Congress in the MMTJA (". . . even if that person could not have brought the action in the District Court as an original matter . . .") allowed the Passengers to then intervene into the Crew Members' action. The Passengers sought no more than what Congress provided and despite inviting the District Court to address the specifics of 28 U.S.C. §1369 and the Congressional intent behind same, which would have given the Passengers their day in Court, the District Court below simply sidestepped any such analysis and called the MMTJA just another jurisdiction 'Act' and accused the Petitioners of subversion. [App. 2].

basis for jurisdiction and the District Court's proposition that the District Court had been exercising MMTJA jurisdiction over all Flight 708 litigation from the beginning. These appeals would not have been necessary had the claims brought on behalf of the passengers and crew of Flight 708 been consolidated into one proceeding and given equal treatment under 28 U.S.C. §1369, which is all that the Petitioners have ever sought.

The procedural history of the Flight 708 litigation allowed the Crew to remain in the District Court—where they ended up settling their claims after these appellate proceedings were well underway--while Petitioners have been dismissed to Martinique to recover nominal damages. The disparate treatment, the multiple fora, the due process denial of not allowing the Passengers to avail themselves to the relief afforded under the MMTJA and the likely chance of inconsistent relief mandates relief.

ARGUMENT FOR GRANTING THE WRIT

I.

A. This Court should grant certiorari to resolve not only a conflict with the letter and intent of the MMTJA, but also a conflict with decisions from the Tenth Circuit Court of Appeals and a prior decision from the United States Supreme Court.

This case likely presents the first opportunity for this Court to interpret the MMTJA and to determine whether the MMTJA requires all cases and all claims that arise from a single catastrophic event to be consolidated into a single Federal Court proceeding and tried together. In so doing, this Court can address the application of the MMTJA, consider the interplay between the MMTJA and *forum non conveniens*, and adjudicate the issues of consolidation and mandatory intervention following a District Court's acceptance of a §1369 action in a mass accident case. Ultimately, the Court can consider whether the decision below, either as a case of first impression under the MMTJA or as a result of conflict with *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975), gives rise to the issuance of a Writ of Certiorari relating to Rule 60(b) relief.

Congress enacted the MMTJA in 2002 to facilitate the joint adjudication of all claims resulting from a single catastrophic accident that results in the deaths of more than 75 people. The

MMTJA facilitates the assembly of one federal proceeding in order to prevent the inequities that often result from scattered multiparty, multiforum litigations. *Wallace v. Louisiana Citizens Prop. Ins.*, 444 F.3d 697, 402 (5th Cir. 2006). The MMTJA, therefore, was intended to curb the inefficient use of judicial resources, to promote the just resolution of claims, and to prevent conflicting or inconsistent judgments from occurring after a single mass accident.[5] *Case v. Anpac Louisiana Ins. Co.*, 466 F.Supp. 2d 781 (E.D. La. 2006).[6] Ultimately, Congress intended to have one litigation result in one judgment following a single, catastrophic accident. The cornerstone for establishing such a unified proceeding was the inclusion of all affected parties into one action. To allow for consolidation of all claims into one MMTJA proceeding, Congress relaxed the diversity requirements (28 U.S.C. §1369(a), (c)), facilitated the removal of state court

[5] "H.R. 860 would allow a designated U.S district court (a so-called 'transferee court') under the multidistrict litigation statute to retain jurisdiction over referred cases for purposes of determining liability and punitive damages, or to send them back to the original courts from which they were transferred. In addition, the legislation would streamline the process by which multidistrict litigation governing disasters are adjudicated. The bill would save litigants time and money, but would not interfere with jury verdicts or compensation rates for attorneys." H.R. Rep. No. 107-14 at 2 (2001) [*fn. omitted*].

[6] The MMTJA also provides Federal Courts with the authority for worldwide service of process (28 U.S.C. §1697) and of subpoenas (28 U.S.C §1785) for hearings and trial, provided they are permitted by law. (*Compare* App. 5 at 9 for the District Court's concerns about non-availability of evidence and witnesses).

actions to federal courts (28 U.S.C. §1441(e)(4)),[7] and required mandatory intervention of all related claims into one action (under 28 U.S.C. §1369(d)).[8] These changes by Congress reveal 28 U.S.C. §1369 to be much more than 'simply' another jurisdictional 'act' as the courts below found. The right to intervene under §1369(d) extends even to those such as the Petitioners who could not successfully establish a claim as an original proceeding themselves, but who can intervene into a §1369 proceeding once established by others as the Crew did in the instant (". . . shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.") 28 U.S.C. §1369(d). *See Ms. Rigg, Ltd., LLC v. LaFayette*

[7] Congress amended 28 U.S.C. §1441 to include (e)(4), which provides that "An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title." Even though Congress may allowed FNC challenges to §1369 "actions", those challenges were required to apply to the entire "action" and not to a particular claim or claimant—but that is what happened below.

[8] Intervention is an ancillary proceeding to an existing lawsuit. *Noncommissioned Officers Assn. of the U.S. v. Army Times Publishing Co.*, 637 F.2d 372, 373 (5th Cir.1981), *mod. on other grounds and reinstated*, 650 F.2d 83 (5th Cir.1981). Once the District Court exercised jurisdiction over and determined venue for the principal action, venue in the ancillary proceeding properly rests upon the venue established by the principal action. *U.S. v. Acord*, 209 F.2d 709 (10th Cir. 1954) [*emphasis added*]; *Gore v. U.S.*, 171 F.Supp. 136 (D.C. Cir. 1959). Once the District Court accepted jurisdiction over the Crew Members §1369 action, ancillary jurisdiction and venue for the Passengers and anyone else injured due to the crash was established as well.

Ins. Co, 2007 WL 1300474 (E.D. La. 2007) (". . . the ultimate goal of MMTJA is consolidation".)[9] Congress intended for the MMTJA to consolidate all claims which arose from a catastrophic disaster into one proceeding.[10] *Wallace*, 444 F.3d at 702 (citing H.R. 106-276 at 7); *also see* 28 U.S.C. §1369(d). This consolidation presents logical sense as all claims arising from a single accident necessarily involve identical facts and identical issues of liability and causation due to the uniform acts or omissions of identical defendants. "There are significant advantages in having all the parties interested in apportioning a limited source of recovery assert their claims in one forum, not only to avoid inconsistent factual findings, but also to spare the litigants the additional costs of duplicate lawsuits." *Contact Lumber Co. v. P.T. Moges Shipping Co. Ltd.*, 918 F.2d 1446, 1452 (9th Cir. 1990). In this regard, the "Purpose and Summary" of H.R. 107-14 reveals a more expansive Congressional intent than the limited jurisdictional concept expressed by the Courts in their decisions below:

> H.R. 860 would allow a designated U.S. district court (a so-called "transferee" court) under the multidistrict litigation statute to retain jurisdiction over referred

[9] *See* 28 U.S.C. §1369; and Karnezis, Kristine, C., J.D., *Construction and Application of Multi-Party, Multi-Forum, Trial Jurisdiction Act of 2002 (MMTJA), 28 U.S.C. §1369*, 32 ALR Fed. 2d 263.

[10] "Current efforts to consolidate all state and Federal cases related to a common disaster are incomplete because current Federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation." H.R. 107-14 at 4.

> cases arising from the same fact scenario for purposes of determining liability and punitive damages. . . . The bill would save litigants time and money, but would not interfere with jury verdicts or compensation rates for attorneys [*Emphasis added.*]

Id. at 2. Additional language within the legislative history of the MMTJA also reflects that Congress did not intend to "simply" confer expanded jurisdiction on the District Courts, but that it also specifically intended to aggregate and consolidate all cases involving the same disaster into one proceeding, regardless of the legal nature of the claims advanced:

> Current efforts to consolidate all state and Federal cases related to a common disaster are incomplete because current Federal statutes restrict the ways in which consolidation can occur—apparently without any intention to limit consolidation. [*Emphasis added.*]

H.R. 107-14 at 4. *Accord Passa v. Derderian*, 308 F.Supp.2d 43, 53-54 (D.C. R.I. 2004) ("It is also clear that Congress' motivation in passing this legislation was to promote judicial efficiency while avoiding multiple lawsuits concerning the same subject matter strewn throughout the country in various state and federal courts.")

Once an action was brought under the MMTJA, the District Court was required to notify the Judicial Panel on Multi-District Litigation of the pendency of the action(s) so that all claims resulting from this crash would thereafter be consolidated for discovery and trial. 28 U.S.C.

§1369(e)[11]. The District Court never did so. When parties moved to consolidate the passenger and Crew claims into a unified Flight 708 proceeding, the District Court denied the request and treated the cases as distinct and unrelated by creating a separate proceeding for only the Crew. The District Court then dismissed the Passenger case for *forum non conveniens* on November 9, 2007. [App. 4, App. 5]. The Crew of Flight 708 later defeated the second of two *forum non conveniens* challenges on May 14, 2009 at which time they rooted a §1369 action that provided "anchor" jurisdiction in which to adjudicate all claims, including the claims of other victims of the same plane crash. [App. 3]. Not only did the Crew action open the District Court's door for their claims, but by operation of 28 U.S.C. §1369 they also opened the doors of the courthouse for everyone else who, like Petitioners, were killed in the same crash.[12]

[11] The District Court has stated that at all times it was exercising 28 U.S.C. §1369 jurisdiction below. [App. 1, App. 2].

[12] Neither does it matter under the MMTJA what claims one has, whether they are Montreal Convention claims, negligence claims, or even product liability claims, as under the MMTJA all that Congress required in order to consolidate or to intervene is for a Plaintiff to have been damaged as a result of the accident – something the Courts below never acknowledged or addressed. As such, the decision of the Circuit Court affirming the District Court for its analysis on page four of the Order [App. 5, App. 4] is clear error as the District Court segregated the Crew and Passengers based on the types of claims brought, i.e. product liability versus Montreal Convention claims, and then used same as a basis to dismiss the Passengers on FNC grounds. Under the MMTJA, Congress made no distinction as to the types of claims brought. 28 U.S.C. §1369(d) allows " . . . any

Consequently, Petitioners sought Rule 60(b) relief from the FNC dismissal of their Montreal Convention claims so that they could intervene their claims into the Flight 708 §1369 proceeding established by the Crew.

It was not until the District Court's May 13, 2009 Order denying FNC dismissal in the Crew Members action [App. 3] that Petitioners first learned that the District Court considered itself to be the most convenient forum to adjudicate a 28 U.S.C. §1369 proceeding for the instant airline disaster. Prior to the rendition of the May 13, 2009 Crew FNC Order, Petitioners were relegated to pursuing their Montreal Convention claims in Martinique. After May 13, 2009, the prior *forum non conveniens* dismissal was irrelevant as under the broad language of 28 U.S.C. §1369(d), it did not matter that the passengers could not establish a §1369 proceeding as an original matter. Once the Crew members successfully established anchor jurisdiction for a §1369 proceeding for the crash, the Passengers, at that instant, were entitled to intervene into the Crew action, regardless of their prior failure to establish a §1369 original action. *See* 28 U.S.C. §1369(d) ("shall be permitted to intervene as a party plaintiff in the action, even if that person could not have brought an action in a district court as an original matter.").

The refusal to grant Rule 60(b) relief not only thwarted Petitioners' attempts to join the Crew's

person with a *claim* arising from the accident . . ." to intervene. As such, it is impossible for the District Court to say that it was exercising §1369 jurisdiction at all times including when it dismissed the passengers for FNC and it is error for the Circuit Court to adopt same.

§1369 action and to bring their Montreal Convention claims in a unified proceeding, but it also undermined the Congressional mandate for intervention under the MMTJA in order that a unified proceeding occur. To deny Petitioners the opportunity to join the Crew frustrated Congress' desire for consolidation. *Rafoth, supra*; and *U.S. v. Canals-Jimenez*, 943 F.2d 1284 (11th Cir. 1991) (do not presume that Congress intended to enact meaningless legislation).

Petitioners met all of the requisites necessary for consolidation under §1369: their "claims" arose from the same "single accident" at the same "discrete location" as the Crew, and the Crew already established "anchor jurisdiction" for a §1369 action for those affected by Flight 708. Yet, they suffered a non merits *forum non conveniens* dismissal while the Crew did not. Section 1369(d) provided Petitioners a basis for 60(b) relief for intervention into the Crew's §1369 proceeding, after the Crew defeated its last FNC challenge, especially in light of the Congressional intent to include all affected by a qualifying accident in the same proceeding by its having used of the term "shall" when addressing intervention of additional party plaintiffs.[13] *DirecTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) (recognizing Congressional intent between use of mandatory "shall" and permissive "may"); and *Legal Env. Assistance Found., Inc. v. U.S. EPA*, 118 F.3d 1467 (11th Cir. 1997) (absent an expression of legislative intent otherwise, the clear and mandatory language of the statute controls). To deny Petitioners relief and the commensurate right litigate their claims

[13] *See Passa*, 308 F. Supp. 3d at 53.

in the Crew's §1369 action in the District Court would frustrate Congress' intent behind the MMTJA jurisdiction established on May 13, 2009 by the Crew and would deny them their day in court. A Writ of Certiorari should issue for the representatives of 102 'Bapte' passengers killed aboard WCA Flight 708.

B. The Circuit Court's denial of Rule 60(b) Relief conflicted with decisions from this Court and from the Tenth Circuit Court of Appeals.

There was nothing equitable about segregating victims of the same aviation disaster into "Passengers" and "Crew" for the purposes of *forum non conveniens* analysis, while refusing the consolidation of all claims, or while denying Petitioners the relief required by the MMTJA. Petitioners are entitled to Rule 60(b) relief from the prior *forum non conveniens* dismissal of the their claims under "traditional principles of equity jurisprudence". *Safe Flight Instrument Corp. v. United Control Corp.*, 576 F.2d 1340, 1343 (9th Cir. 1978)(Decision in related case qualified as an "exceptional" circumstance warranting relief under Rule 60(b)) (citing *System Federation v. Wright*, 364 U.S. 642, 648 (1961); *also see U.S. v. Swift & Co.*, 286 U.S. 106, 115 (1932)). There was nothing equitable or fair in allowing the Crew of Flight 708 to litigate their claims in the District Court and pursue recovery based on domestic damage standards after having relegated the passengers who perished in the same crash to litigate their claims against a Florida based

carrier in Martinique, France so as to recover greatly reduced damages.[14] [App. 3].

"The general purpose of Rule 60(b) . . . is to strike a proper balance between the conflicting principles that litigation must be brought to an end and that justice must be done." *Coltec Ind., Inc. v. Hobgood*, 280 F.3d 262, 271 (3d Cir. 2002) (*quoting Boughner v. Sec'y of Health, Educ. & Welfare*, 572 F.2d 976, 977 (3d Cir.1978). As the mechanism for obtaining relief, Rule 60(b) ". . . should be liberally construed when substantial justice will be served." *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538 (2d Cir. 1963). Rule 60(b) relief has long been available to harmonize inconsistent decisions rendered in related cases arising out of the *same accident* in order to treat all affected claimants equally. *See e.g., Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) (granting relief and reinstating the death benefits awarded to survivors after it was "apprised, however, of 'intervening circumstances of substantial effect' [*i.e.*, the appellate approval of death benefits to others involved in the same accident] justifying application of the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules'" (quoting *U.S. v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)); *Tsakonites v. Transpacific Carriers Corp.*,

[14] Both the District Court and the Eleventh Circuit clearly erred in concluding that the Crew and Passengers could be treated differently based on the types of claims brought when under the MMTJA Congress required no limitation on types of claims to be brought to the one consolidated proceeding. *See* 28 U.S.C. §1369(d).

322 F.Supp. 722 (S.D.N.Y. 1970) (granting relief from a dismissal for lack of jurisdiction under Rule 60(b)(5) and (6) after the United States Supreme Court considered a case presenting *similar jurisdictional facts* and involving the *same defendant* as the one sued by Mr. Tsakonites);[15] *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975) (granting Rule 60(b)(6) relief because "the same vehicular accident has produced divergent results in federal and state courts"); and *Ritter v. Smith*, 811 F.2d 1398 (11th Cir. 1987) (discussing the importance of harmonizing the relief for litigants involved in related cases).[16] More recently, the United States Supreme Court in *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992) directed that relief under Rule 60(b) is properly granted when the request for relief is founded on ". . . either a significant change either in factual conditions or in law". *Accord Agostini v. Felton*, 521 U.S. 203 (1997) (granting Rule 60(b) relief based on subsequent change in the law).

The instant scenario calls out for equity under Rule 60(b)(5) and (6) as the continued application of the Passenger FNC dismissal Order is

[15] In discussing *Tsakonitis*, the Eleventh Circuit Court of Appeals recognized that, "Because of this ***close connection between the two cases***, the court found the circumstances sufficiently extraordinary to justify disturbing the finality of the judgment." *Ritter v. Smith*, 811 F.2d 1398, 1401 (11th Cir. 1987) [*emphasis added*].

[16] "The unusual combination of events which have occurred make the situation extraordinary. The federal courts in which plaintiffs were forced to litigate have given them **substantially different treatment than** that received in state court by **another injured in the same accident**." *Id.* [*Emphasis added.*]

preventing them from accessing the relief Congress intended when it passed the MMTJA. Further, the Eleventh Circuit's Order creates conflict with prior decisions of this Court in *Gondeck v. Pan Am. World Airways, Inc.*, 382 U.S. 25 (1965) and with a sister Circuit, *Pierce v. Cook & Co.*, 518 F.2d 720 (10th Cir. 1975).

In *Gondeck*, this Court determined that the only equitable means of affording victims of the same automobile accident equity was to grant petitioners Rule 60(b) relief so that they could recover damages commensurate with those recovered by the other victims of the same automobile accident. The Tenth Circuit Court of Appeals took the same approach in *Pierce*, when it relieved petitioners from the dismissal of their claims so that they could recover damages commensurate with those already obtained by victims of the same accident. In this case, Petitioners were denied access to the District Court to even seek the same relief by virtue of a *forum non conveniens* dismissal even though other victims of the same accident—the Crew—were permitted to litigate their claims. The Circuit Court's's refusal to grant Petitioners relief from the non-merits, *forum non conveniens* dismissal, conflicted with the *Gondeck* and *Pierce* decisions. By affirming the District Court's decision to relegate the MMTJA to "simply" a jurisdictional act, and by directing Petitioners to Martinique, France for recovery of greatly reduced damages while allowing the Crew that crashed the plan to proceed in the District Court, the Circuit Court ignored the Congressional intent behind the enactment of the MMTJA and the specific provisions of the MMTJA found at 28 U.S.C. §1369

such that Rule 60(b)(5) and (6) relief was warranted.

Accordingly, relief to Petitioners is in order, as the Eleventh Circuit's decision is contrary to the MMTJA, *Gondeck* and *Pierce*. A Writ of Certiorari should issue for the representatives of 102 'Bapte' passengers killed aboard WCA Flight 708.

CONCLUSION

Rule 60(b)(5) and (6) relief is available to do equity when circumstances arise which create inequity, injustice or unfairness. Given that Congress clearly provided that even those who could not maintain an original action under 28 U.S.C. §1369(d) could still intervene once an anchor jurisdiction for an MMTJA action was established, the Petitioners were still entitled to join the Crew Members' action under the statute. To deny the Petitioners the full relief afforded by the MMTJA amounted to a denial of their due process. The lower Courts' decisions which refused to grant Rule 60(b) relief, which avoided the specifics of the MMTJA and which disregarded the intent of Congress in passing the MMTJA demonstrate why Rule 60(b) relief was warranted and how the Eleventh Circuit's ruling conflicts with prior decisions of this Court and other Circuit Courts. In light of the foregoing, a Writ of Certiorari should issue for the representatives of the 102 'Bapte' passengers killed aboard WCA Flight 708.

Respectfully submitted,

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Dated: June 23, 2010

APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 09-15175
Non-Argument Calendar
Filed March 25, 2010

D.C. Docket No. 06-22748-CV-UU

SYLVIA BAPTE, Individually and as personal representative of the Estate of Christiane Bapte, deceased, STEPHANIE ISABELLE BAPTE, MARYVONNE BAPTE,

Plaintiffs-Appellants,

—versus—

WEST CARIBBEAN AIRWAYS, a Colombian corporation, NEWVAC CORPORATION, a Florida corporation, GO 2 GALAXY, INC., a Florida corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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Before TJOFLAT, WILSON and COX,
Circuit Judges.

PER CURIAM:

In August 2005, while en route from Panama to Martinique, West Caribbean Airlines, S.A. Flight 708 crashed in Venezuela, killing all passengers and crew on board. Representatives of the passengers filed several lawsuits, which were consolidated in the United States District Court for the Southern District of Florida. They asserted wrongful death and strict liability claims against Defendants West Caribean Airlines, Newvac Corporation, Go 2 Galaxy, Inc., and Jacque Cimieter pursuant to 28 U.S.C. § 1369. In addition, representatives of the crew members brought products liability lawsuits against manufacturers of the airplane and negligence suits against Newvac in the same district court. The crew cases were consolidated with one another, but were not consolidated with the passenger cases.

In November 2007, the district court dismissed the passenger cases on *forum non conveniens* grounds, and the passengers' representatives appealed. We affirmed the district court's order dismissing the cases in *Pierre-Louis v. Newvac Corp.*, 584 F.3d 1052 (11th Cir. 2009). In May 2009, while the appeal of the dismissal was still pending, the district court denied a motion to dismiss the crew cases on *forum non conveniens* grounds. Believing that the denial of the motion to dismiss the crew cases changed the circumstances surrounding the prior dismissal of the passenger cases, the representatives of the passengers filed a motion for relief from judgment with the district court. *See* Fed. R. Civ. P. 60(b).

The district court issued an order on the Rule 60(b) motion while the appeal of its dismissal of the passenger cases was still pending. It held that due to the pendency of the appeal, it lacked jurisdiction to rule on the motion for relief from judgment. (R. 19-251 at 1.) Even so, the court addressed the merits of the motion and wrote "to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion." (*Id.*) The court explained that "[t]he Motion is based on no just or equitable reason which warrants relief" (*id.* at 2), and its order denying the motion to dismiss the crew cases on *forum non conveniens* grounds did not mean that the continued application of its order dismissing the passenger cases was no longer equitable. (*Id.* at 4.)

After review of the record, we conclude that the district court erred in holding it lacked jurisdiction to consider the motion. We have held that a district court retains jurisdiction to consider a Rule 60(b) motion for relief from judgment even after an appeal of the judgment from which relief is sought has been noticed. *See Parrott v. Wilson*, 707 F.2d 1262, 1266-67 n.8 (11th Cir. 1983) (citing *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976); *Ferell v. Trailmobile, Inc.*, 223 F.2d 697, 698-99 (5th Cir. 1955)). Nevertheless, because the motion does not assert adequate grounds for relief from judgment, we conclude that the erroneous jurisdictional ruling was harmless, and we affirm the denial of relief.

The passengers' representatives argue that the denial of the motion to dismiss the crew cases created an automatic right, under 28 U.S.C. § 1369,

for the passengers to intervene in the crew cases. They argue that the denial established the Southern District of Florida as the appropriate forum for resolving any claim arising out of the crash of Flight 708 and constituted changed circumstances justifying relief under Rule 60(b)(5) and/or (6). We agree, however, with the district court's well-reasoned analysis on page four of its order explaining that 28 U.S.C. § 1369 merely provides the court with jurisdiction over all claims arising out of the disaster and that it exercised that jurisdiction when it applied the doctrine of *forum non conveniens* to dismiss the passenger cases. (R. 19-251 at 4.) We agree that its denial of a motion to dismiss the crew cases on *forum non conveniens* grounds did not make continued application of its dismissal of the passenger cases inequitable. (*Id.*)

The district court had jurisdiction to consider the Rule 60(b) motion, but the motion did not assert appropriate grounds for relief from judgment. Therefore, we vacate denial of the motion for want of jurisdiction, and amend the order to deny the motion on the merits. We affirm the order as amended.

ORDER AMENDED AND AFFIRMED.

A True Copy - Attested
Clerk U.S. Court of Appeals
Eleventh Circuit

By : /s/ [Illegible]
Deputy Clerk
Atlanta, Georgia

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-22748-CIV-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, *et al.*

ORDER ON MOTION FOR RULE 60(B) RELIEF

THIS CAUSE is before the Court on the "Bapte" Plaintiffs' Motion For Rule 60(b) Relief and Incorporated Memorandum of Law in Support (the "Motion") (D.E. 247) and Request for Oral Argument (D.E. 248), both filed on August 28, 2009.

THE COURT has considered the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. The Motion seeks relief from this Court's Order Granting Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*, entered on November 18, 2007 (the "FNC Order"). (D.E. 184.) In the FNC Order, the Court dismissed the actions of the passengers, including those of the "Bapte" Plaintiffs, against Defendants West Caribbean Airlines, S.A. ("West Caribbean"), Newvac Corporation ("Newvac"), and

Go 2 Galaxy, Inc. ("Go 2") under the Montreal Convention and directed the passengers to pursue their remedies in the French court in Martinique.[1]

The FNC Order to which the Motion is directed is on appeal and oral argument is scheduled for September 23, 2009. Due to the pendency of the appeal, this Court lacks jurisdiction to rule on the instant motion. Nonetheless, the Court writes to advise the parties and the Eleventh Circuit Court of Appeals that if this Court had jurisdiction, it would deny the Motion.

The Motion is based on no just or equitable reason which warrants relief. Rather, the Motion is merely part of strategy to subvert the FNC Order, indirectly influence the Eleventh Circuit Court of Appeals, and return to this Court at all costs, including the lost opportunity for speedier and more complete justice in the French court.[2] While

[1] This case arises of the August 16, 2005 crash of an airplane operated by West Caribbean, a Columbian airline. The crash occurred in Venezuela. Newvac chartered the aircraft for Go 2, a Martinican travel agency, for a series of round-trip flights between Martinique and Panama. The deceased passengers were mainly French citizens and residents of Martinique—none were United States domiciliaries.

[2] This strategy consists of three parts: first, petitioning the French court in Martinique to decline jurisdiction over the passengers' Montreal Convention claims (which effort was rejected by the French court on August 24, 2009); second the filing of a motion to intervene in the product-liability actions brought in this District by the representatives of the estates of the deceased crew members, notwithstanding that the "Bapte" Plaintiffs represented in their opposition to the motion to dismiss the passengers' cases on the grounds of *forum non conveniens* that resulted in the FNC Order that they would not pursue such claims; and

the Court of Appeals might ultimately view the FNC Order differently, this Court's view is that subsequent events have confirmed that the French court is the superior forum for the resolution of the passengers' Montreal Convention claims, such as were raised by the "Bapte" Plaintiffs. The French court is poised to make collectible damage awards for the passengers' wrongful deaths pursuant to French law. West Caribbean has conceded liability in the French court and waived the damages caps under the Montreal Convention; moreover, its insurer has agreed to pay the passengers' estates the full amount of the awards.[3] In contrast to the French court, this Court does not have personal jurisdiction over West Caribbean—the only defendant to the Montreal Convention claims with adequate assets and insurance coverage. And, liability for any additional product-liability claims, even if permitted, is purely speculative and surely distant in resolution.

In the Motion, the "Bapte" Plaintiffs argue that the Court's May 14, 2009 Order Denying the Defendants' Motions to Dismiss on the Grounds of *Forum Non Conveniens* in the companion, consolidated "Crew Member Case" (Case No. 07-22015-Civ-Ungaro, D.E. 321) now makes it apparent that there will be duplicate litigation arising out of the

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third, this Motion which argues that circumstances somehow have changed since entry of the FNC Order favoring litigation in this District by reason of the pendency of the product-liability claims of the representatives of the deceased crew members, despite the fact that such cases have been pending since August 2007.

[3] West Caribbean has approximately 450 million euros in coverage for the claims arising from the accident.

crash in both this Court and the French court in Martinique which could yield inconsistent results.[4] However, the passengers' Montreal Convention claims in the French court and the product-liability Crew Member Case in this Court are materially distinct and pose no danger of inconsistent results. With respect to liability; in Montreal Convention cases, the airline's fault is presumed; while in the product-liability cases, complicated issues of product defect and causation on the part of the aircraft's manufacturers, lessors, lessees, and owners must be resolved. In

[4] Actually, this Court, in the Crew Member Case, denied a *forum non conveniens* motion seeking a transfer to the French court on September 30, 2008, nearly a year ago; the motion was denied mainly because the Court was not persuaded that a French (European Union) court would have jurisdiction over the claims of the estates of the deceased Colombian crew members against U.S. corporations for an accident in Venezuela. The May 14, 2009 order in the Crew Member Case denied a *forum non conveniens* motions seeking a transfer to Columbia.

What really prompted the filing of this Rule 60(b) motion is that after this Court issued the FNC Order, the "Bapte" Plaintiffs sought to persuade the French court to decline to exercise jurisdiction over their Montreal Convention claims. The Court infers that the purpose of this exercise was to be able to argue to the Court of Appeals that the French court was not an alternative available forum for the Montreal Convention claims and that therefore the FNC Order should be reversed. This effort, however, came to a conclusion on August 24, 2009 when the French court ruled that it had jurisdiction and ordered the "Bapte" Plaintiffs to submit proof of their damages by October 23, 2009. This Rule 60(b) Motion followed four days later. The failed attempt in Martinique to frustrate this Court's duly entered order hardly qualifies as a just or equitable reason for relief under Rule 60(b).

fact, in the Montreal Convention cases pending in the French court, West Caribbean, over which this Court cannot assert jurisdiction, has appeared and both conceded liability and waived the damage caps. And under any theory of liability, the passengers' estates will be entitled to but one recovery for wrongful death and those damages will have to be assessed in accordance with the law of the place with the most significant relationship to the issue of damages. *See, e.g., Harris v. Berkowitz*, 433 So. 2d 613 (Fla. 3d DCA 1983). In the case of the "Bapte" Plaintiffs, for example, that assessment likely will be made under the law of their domicile regardless of forum location.[5] *See id.*

The "Bapte" Plaintiffs also argue that somehow the Court's May 13, 2009 order denying the motion to dismiss *on forum non conveniens* grounds in the Crew Member Case, triggered the application of 28 U.S.C. § 1369 by establishing the Southern District of Florida as the single forum for resolution of all claims arising out of the West Caribbean crash. However, the statute simply provides for this Court to have original jurisdiction over all claims arising from the disaster, and this Court has been exercising that jurisdiction since 2006. It was in the exercise of that jurisdiction that the Court determined that the doctrine of *forum non conveniens* warranted re-filing of the

[5] The undersigned concedes that, depending on the forum, the damages awards might or might not be made by a jury. But speculation that a jury award might be greater than a non-jury award is not a just or equitable reason warranting Rule 60(b) relief from the FNC Order.

wrongful death claims arising under the Montreal Convention in the French court in Martinique.[6]

Finally, the Court notes that, although not argued as a ground for Rule 60(b) relief, the "Bapte" Plaintiffs have moved to intervene in the consolidated Crew Member Case and therefore may contend that they should not be required to litigate in two fora. However, it is obvious that litigation in Martinique on the Montreal Convention claims will best serve the "Bapte" Plaintiffs' interests. Unlike in the Crew Member Case where liability is contested and not likely to be resolved for some time, the "Bapte" Plaintiffs and the estates of the other passengers will be able to obtain a prompt and possibly full recovery in the French court.

In sum, the "Bapte" Plaintiffs have failed to demonstrate that continued application of the FNC Order is no longer equitable or that any other of the reasons they cite justifies relief. In fact, the French court in Martinique clearly can provide speedier and more complete justice than possibly can be provided in this forum. Therefore, the FNC Order was and remains entirely in the "Bapte" Plaintiffs' interests and legally correct.

Accordingly, it is hereby

ORDERED AND ADJUDGED that the Motion For Rule 60(b) Relief and Incorporated Memorandum

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[6] That a federal court may have jurisdiction over an action does not moot the doctrine of *forum non conveniens*. In fact, only in limited circumstances may a court apply the doctrine before jurisdiction is established. *See Sinochem Intern. Co. Ltd. v. Malaysia Inter. Shipping Corp.*, 549 U.S. 422, 432 (2007).

of Law in Support (D.E. 247) is DENIED FOR LACK OF JURISDICTION. It is further

ORDERED AND ADJUDGED that the Request for Oral Argument (D.E. 248) is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 11th day of September, 2009.

/s/ URSULA UNGARO
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 07-22015-CIV-UNGARO

IN RE WEST CARIBBEAN CREW MEMBERS

ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS ON THE GROUNDS OF *FORUM NON CONVENIENS*

THIS CAUSE is before the court on the following motions filed by Defendants: MK MK Aviation U.S.A. Inc.'s (MK Aviation) and MK Leasing's USA Ltd.'s (MK Leasing) Motions to Dismiss on the Grounds of *Forum Non Conveniens* (D.E. 160, 178); the Boeing Company's ("Boeing") Motion to Dismiss on the Grounds of *Forum Non Conveniens*, (D.E. 245); Honeywell International Inc.'s ("Honeywell") Motion to Dismiss on the Grounds of *Forum Non Conveniens* in favor of Colombia and joinder in The Boeing Company's and MK Leasing Inc.'s motions (D.E. 244); Pratt & Whitney Canada Corporation's, United Technologies Corporation's, and Pratt & Whitney Engine Services, Inc.'s Motion to Dismiss on the Grounds of

Forum Non Conveniens in favor of Colombia and joinder of Boeing's and MK Leasing's arguments in support of their respective motions to dismiss in favor of Colombia (D.E. 250); Defendants Newvac Corporation Inc. ("Newvac") and Continental Airlines Inc. ("Continental") and Pacific Harbor Capital Inc. ("PHC") adopted Boeing and Honeywell's motions to dismiss. (*See* D.E. 247, 249, 300.) The court shall refer to all Defendants as "Defendants." Plaintiffs filed one collective response to Defendants' motions. (D.E. 291.) Defendants filed replies to Plaintiffs' response. (*See* D.E. 294, 295, 296, 304.) The court has considered the motions and is otherwise fully informed in the premises.

BACKGROUND[1]

On August 16, 2005, an MD-82 aircraft designated West Caribbean Airways ("WCA") Flight 708, departed from Panama City, Panama for Fort de France, Martinique. While in flight, the aircraft lost speed and ultimately crashed in a swamp near Machiques, Venezuela. All passengers and crew members were killed. Plaintiffs are nine representatives of the eight deceased Colombian crew members who worked aboard the aircraft. All of the named Defendants are U.S. based corporations[2] who at some time prior to the crash were allegedly responsible for the maintenance,

[1] The facts recited herein are taken from the Consolidated Third Amended Complaint ("Am. Compl.").

[2] The place of incorporation of the Defendants is as follows; Boeing, Pratt Engine, Honeywell, and PHC are Delaware corporations (Am. Compl.¶¶ 1, 16, 20, 22); United Technologies is a Connecticut corporation (Am. Compl. ¶ 13);

repair and airworthiness of the aircraft and/or its engine parts.

Although the crash took place in a foreign territory, Plaintiffs' product liability claims primarily arise from the manufacture, maintenance and repair of the subject aircraft and its engine parts over a nineteen year period in the United States. The aircraft's chain of custody dates back to at least November 4, 1986, when Continental leased it as a commercial airliner pursuant to a series of agreements executed with Boeing and PHC. (Am. Compl. ¶ 32.) The lease, by its terms, was to expire on January 2005. (Am. Compl. ¶ 32.)

Continental operated the aircraft as a commercial airliner within the United States until 2001. (Am. Compl. ¶ 34, 35.) Between the years 1986 and 2001, more than 22 Service Difficulty Reports were issued regarding the subject aircraft. (Am. Compl. ¶ 36.) The Service Difficulty Reports addressed problems with, among other parts, the tail cone and right engine. (*Id.*) Additionally, the aircraft was equipped with JT8D Pratt & Whitney engines; the FAA has issued countless Airworthiness Directives relating to problems with the JT8D Pratt & Whitney engines in general, including, but not limited to, warnings as to bogus parts used in the JT8D engines out of Miami, Florida. (Am. Compl.¶ 37.) In October 2001, Continental retired the subject aircraft to the Mojave Desert in

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Pratt Canada is a Canadian Corporation (Am. Compl. ¶ 19); Continental and MK Aviation are Nevada corporations; (Am. Compl. ¶¶ 24, 28); Newvac is a Florida corporation (Am. Compl. ¶ 26.); and MK Leasing was a Texas Corporation (Am. Compl. ¶ 29). Plaintiffs allege that all the Defendants conducted business in Florida.

California where it remained for the balance of the lease and degenerated into a state of disrepair. (Am. Compl. ¶35.)

Between late 2004 and 2005, PHC made preparations to accept return of the subject aircraft from Continental in anticipation of the expiration of Continental's lease in 2005. (Am. Compl. ¶39.) Among other steps, in 2004, PHC contracted Aeronautical Systems, Inc., ("ASI"), an aircraft appraisal, brokerage and technical consultant located in Florida, to inspect the aircraft, its engines and technical documents. (Am. Compl. ¶42.) After the inspection, ASI was to provide PHC with return and re-marketing consultation services relating to the aircraft. (*Id.*)

Prior to returning the aircraft to PHC, Continental proposed to substitute the original engine in Position 2 with a replacement engine. (Am. Compl.¶43.) Upon inspecting the proposed replacement engine and comparing it to the original engine in Position 2, ASI concluded that the replacement engine had less value and a shorter life expectancy. (*Id.*) According to ASI's engine inspection report, the replacement engine had been assembled with spare parts from other used engines, which increased the problem of traceability for the replacement engine as compared to the original engine. (Am. Compl. ¶44.) Moreover, ASI concluded that the replacement engine had a heavy maintenance status that was considerably worse than that of the original engine. (*Id.*) Memoranda regarding these inspections were sent from ASI to Continental and carbon copied to PHC. All of the communications and transactions relating to the replacement of the original engine in Posi-

tion 2 of the aircraft took place in the United States, many originating in Ft. Lauderdale, Florida. (Am. Compl. ¶ 43.)

Based on its review of the engine, ASI requested that Continental and PHC provide other potential replacement engines for review. (Am. Compl. ¶ 45.) Despite this request, PHC did not cause another replacement engine to be considered, and Continental did not supply any alternative engines for consideration. (*Id.*) Plaintiffs allege that while cognizant that the replacement engine had suspicious replacement parts and a shorter life expectancy than the original engine in Position 2, Continental and PHC caused the original engine in Position 2 to be substituted with the replacement engine that had been assembled from used parts. (Am. Compl. ¶ 46.) Continental agreed to convey the replacement engine to PHC and Wilmington Trust Company (WTC), PHC's trustee at the time, in an agreement dated December 23, 2004. The transaction was allegedly rushed to conclusion in late 2004 so that PHC and WTC could convey the replacement engine to MK Aviation as an integrated component part of the subject aircraft in early 2005. (Am. Compl. ¶¶ 47, 48.) Continental delivered the replacement engine to PHC and WTC at Hobby Airfield in Houston, Texas.

On January 5, 2005, WTC and PHC sold the subject aircraft to MK Aviation, and on January 6, 2005 it was delivered by Continental to MK Aviation in Houston, Texas. (Am. Compl. ¶ 49.) At the time MK Aviation took possession, the aircraft had accumulated more than 48,000 hours and 23,000 cycles. (Am. Compl. ¶ 50.) The aircraft

remained in Houston for approximately seven additional months.

On March 15, 2005, Newvac, doing business in Florida as Go-2 Vacations, negotiated and executed a contract in Florida with WCA for use of an MD-8 aircraft. (Am. Compl. ¶56, 57, 65). Pursuant to the contract, Newvac contractually assumed all risks associated with air navigation for the entire aircraft for twenty-four specifically identified dates. (Am. Compl. ¶¶59-64.) On those dates, Newvac was to have sole and exclusive use of the entire aircraft and it was to select the routes, departure times and itineraries for the flights, while WCA was to supply the aircraft and crew. Due to operational and maintenance concerns relating to the proposed MD-8 aircraft, Newvac caused WCA to substitute the aircraft that later crashed for the MD-8 aircraft contemplated by the contract. (Am. Compl. ¶62.)

Pursuant to the contract, Newvac began sole and exclusive use of the aircraft on July 2, 2005. Newvac used the subject aircraft and the WCA crew on seventeen occasions. (Am. Compl. ¶¶66.) Newvac's last use occurred on August 16, 2005, the day of the crash. (Am. Compl. ¶¶67, 68.)

LEGAL STANDARD

The common law doctrine of *forum non conveniens* permits a court to dismiss a case over which it has jurisdiction, where factors of convenience and justice demonstrate that the matter should proceed in an alternative forum. A party moving to dismiss an action on the basis of *forum non conveniens* "must demonstrate that (1) an adequate

alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiffs can reinstate their suit in the alternative forum without inconvenience or prejudice. . ." *Leon v. Million Air, Inc.*, 251 F.3d 1305 (11th Cir. 2001).

ALTERNATIVE FORUM

A defendant bears the burden of persuasion when invoking the doctrine of *foreign non conveniens* and moving to dismiss in favor of a foreign forum. *Camejo v. Ocean Drilling & Exploration*, 838 F.2d 1374, 1379-1380 (5th Cir. 1988). This burden of persuasion runs to all the elements of *forum non conveniens* analysis. (*Id.*) Therefore, the moving defendant must establish that an adequate and available forum exists as to all defendants if there are several. If the moving defendant carries this initial burden, it must also establish that private and public interests factors weigh heavily on the side of trial in the foreign forum. (*Id.*) The Supreme Court has held that a moving defendant need not submit overly detailed affidavits to carry its burden, but must provide enough information to enable the district court to balance the parties' interests. *Piper Aircraft Co. v. Reyno* 454 U.S. 235, 258 (1981).

For *forum non conveniens* purposes, forum availability and adequacy are separate considerations. With respect to adequacy the "alternative forum need not be perfect." *See Leon v. Million Air, Inc.*, 251 F.3d. 1305, 1311 (11th Cir. 2001). Nonetheless "[c]ourts have been strict about requiring that Defendants demonstrate that the alternative

forum offers at lease some relief." *Id.* Ordinarily, the court will find that an alternative forum exists if the defendant is "amenable to process" in the foreign jurisdiction. *Piper,* 454 U.S. at 262 n.22 (1981). However, where the remedy offered by the other forum is so unsatisfactory that it forecloses any remedy at all, this requirement may not be satisfied, the district court may conclude that dismissal would not be in the interests of justice. *Piper,* 454 U.S. at 254.

ANALYSIS

A. Availability of the Colombian Court

Defendants argue Colombian courts can exercise jurisdiction over the instant case on the grounds that (1) Article 23(2) of the Colombian Civil Procedure Code ("CCP") expressly authorizes jurisdiction in matters of this type; (2) the facts of the instant case have a clear connection to Colombia; (3) and Plaintiff's choice of forum is not entitled to deference as the crew members and their representatives are Colombian. *(See* D.E. 304 at 2-7.) Having carefully considered the parties' positions, the affidavits of their Colombian law experts, the applicable rules of jurisdiction contained in the CCP as well as other relevant provisions of Colombian law, and the underlying requirements of the *forum non conveniens* doctrine, the court finds Defendants have satisfied their burden of persuasion that Colombia affords an available alternative forum.

As an initial matter, the court agrees with both parties that Article 23 of the CCP and its sub-

paragraphs contain the basic rules governing jurisdiction in the Colombian courts. Most relevant to this case is Article 23(2) which states "If the defendant has no domicile, the judge of his residence is competent, and if the defendant does not reside in the country, the judge of the plaintiff's domicile is competent." *(See* D.E. 244-2.) The court further agrees with Defendants and their experts, Professors Luis Fernando Salazar-Lopez and Bernardo Salazar, that pursuant to the plain and literal terms of Article 23(2), Colombian courts of Plaintiffs' domiciles can exercise jurisdiction over the claims asserted in the present consolidated action given the fact that all the Plaintiffs are domiciled in Colombia and Defendants are not. Although Defendant's expert, Professor Reyes, contends that Article 23, taken as a whole, evinces a preference under Colombian law that corporations be sued in their place of domicile, the fact remains that Article 23(2) expressly addresses the situation where no defendant is domiciled or resident in Colombia and, in that event, plainly authorizes jurisdiction in the plaintiff's domicile. Similarly, Article 23(8) permits a Colombian court situated where a tortious act occurred to exercise jurisdiction, regardless of the domicile or residence of the defendant. Therefore, Article 23 clearly provides for exceptions to the general rule in Colombian law, if it exists, that corporations be sued where they are domiciled.

In reaching the conclusion that a Colombian court would take jurisdiction of this matter consistent with the literal language of Article 23(2), this court further finds persuasive Professor Salazar's opinion that there are at least two other

enactments in Colombia which suggest that the Defendants would be subject to liability in Colombian courts. The first is Article 78 of the Colombian Constitution which provides that one who "participates in the manufacturing and commercialization of good and services that affect the health or the security of consumers and users" is subject to liability under Colombian law; Article 78 apparently makes no distinction between foreign and domestic manufacturers and distributors. (Pls.' Resp., Ex. D ¶37.) The second is Decree 3466 of 1982 of the Colombian Consumer Statute (Decree 3466) which authorizes consumers and users to bring product liability claims against manufacturers, importers, and/or dealers for breach of warranty, breach of registered or announced quality standards, and for the payment of the damages caused by the defective products or services. (Pls.' Resp., Ex. D ¶38.) Salazar explains that the word "producer" under Decree 3466 means "every person, natural or legal entity, who produces, processes, transforms, or uses one or more goods with the purpose of obtaining one or more products or services addressed to the public consumption" and that the statute also makes no distinction between foreign and domestic "producers."

Plaintiffs' Colombian law expert, Professor Francisco Reyes recognizes, as he must, that in Colombia, a civil law country, the jurisdiction of the courts is established only by the Colombian Constitution, codes, statutes and treaties. Nonetheless, he urges this court to follow a Colombian Supreme Court of Justice ("SCJ") decision holding that the subject matter of a claim

must have a "relational connection" to Colombia in order for a Colombian court to exercise jurisdiction and that Plaintiffs' domicile, standing alone, does not satisfy that requirement. He also cites to scholars who have authored treatises who support that position. (Pls.' Resp., Ex. F ¶ 22.) Plaintiffs have failed to submit the SCJ case for the Court's review; thus, the Court accords little weight to Professor Reyes's description and interpretation of the SCJ decision. However, it appears to the undersigned that, in any event, there is a "relational" basis for jurisdiction under Colombian law consistent with the interpretations stated in the treatises to which Reyes cites. According to Professor Reyes, the relevant considerations to establish jurisdiction are "objective, subjective, functional, territorial and connection to the jurisdiction." (Pls.' Resp., Ex. F ¶ 22). These factors would appear to be present in this case given that Plaintiffs are domiciled in Colombia, the decedents were Colombian domiciliaries, Plaintiffs' damages accrued in Colombia, and WCA, a Colombian airline, supplied the allegedly defective aircraft.

The undersigned also is unpersuaded by Professor Reyes's opinion that Defendants' inability to cite any case law from Colombian courts indicating that Colombian nationals can initiate tort suits against foreign defendants for wrongful conduct occurring outside Colombia somehow shows that Colombia is not an available forum. Given the clarity of Article 23(2), the court finds more significant that Plaintiffs and their expert fail to produce any cases, articles or excerpts from treatises identifying instances where Colombian courts

have denied jurisdiction to their own citizens who have suffered damages as a result of extra-territorial wrongful conduct.

Lastly, the court notes its disagreement with Plaintiffs that they have an absolute right to select the forum, whether foreign or domestic, under Colombian law. While that may be the law in Colombia, that is not the law in the United States where this action is currently pending. And Plaintiffs have submitted no authority suggesting that the Colombian courts would decline to exercise jurisdiction over this case on the ground that it was initiated by Plaintiffs in the United States. The Supreme Court case on which Plaintiffs rely to make this argument also was not supplied, but appears simply to hold that a Colombian court will not disturb the Plaintiffs' choice of another Colombian forum. More to the point, Defendants' have provided at least one illustration of a case dismissed by an American court on the grounds of *forum non conveniens* and then re-filed and litigated in Colombia. (*See* D.E. 304, Ex. B.)

C. Adequacy of the Forum

An alternative forum is "presumed" adequate unless the plaintiff makes some showing to the contrary." *Leon*, 251 F.3d. at 1312. "An adequate forum need not be a perfect forum." *Satz v. McDonnell Douglas Corp.* 244 F.3d 1279, 1283 (11th Cir. 2001.) However, "where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative. . ." *Piper Aircraft*, 454 U. S. at 255 n. 22. Plaintiffs argue that the lack of safety and security for witnesses and lawyers in Colombia

makes the Colombia court an unsafe and inadequate alternative forum. (Pls.' Resp. 7.) Plaintiffs submit Exhibit M, a French Report, indicating that on one occasion, a Colombian paramilitary group intimidated witnesses and Colombian Judges in an effort to frustrate their testimony or investigation into the subject accident. (Pls.' Ex. M.) Plaintiffs also submit documents from the U.S. State Department and other human rights reports that generally warn U.S. citizens of the dangers of traveling to Colombia. (Pls.' Exs. N, O, P, Q, R.) The court has reviewed Plaintiffs' exhibits, and is not persuaded that the safety concerns the documents identify establish that the Colombia court is so unsatisfactory that it forecloses any remedy. Although imperfect, the court finds Colombia to be an available and adequate forum in which Plaintiffs can pursue their claims. *Satz*, 244 F.3d. at 1283.

Since Defendants have established the availability and adequacy of an alternative forum, the court must now determine whether private and public interests factors weigh in favor of dismissal on grounds of *forum non conveniens*.

D. Private and Public Interests Factors

i. *Plaintiffs' choice of forum*

"There is ordinarily a strong presumption in favor of the plaintiffs' choice of forum, which may be overcome only when the private and public interest factors clearly point towards trial in the alternative forum." *Piper Aircraft*, 454 U.S. at 255. However, the presumption applies with less force when the plaintiffs are foreign. *La Seguri-*

dad v. Transytur Line, 707 F.2d 1304, 1307 (11th Cir. 1983). Here, all nine Plaintiffs are Colombian citizens. Thus, the court must apply a weaker presumption and less deference towards Plaintiffs' choice of forum. Nevertheless, "less deference" to their choice of forum does not mean "no deference." The burden remains with the Defendants to establish that the private and public interest factors heavily weigh in favor of dismissal.[3]

ii. *Private Interests Factors*

> The Court's consideration of private interest factors include the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of the premises, if view would be appropriate to the action; and all other

[3] Despite the fact that Plaintiffs herein are foreign, Plaintiffs also argue that they should receive the full benefit of the presumption in favor of their chosen forum because Colombia and the United States have a treaty guaranteeing Colombian citizens access to the United States courts equal to that of United States citizens. (Pls.' Resp. 10-11.) Notably, Plaintiffs did not supply the treaty. Moreover, this court has previously held that these friendship treaties apply to legal actions involving citizens of one signatory who are "transient or dwelling" in the territory of the other signatory *Da Rocha v. Bell Helicopter Textron, Inc.*, 451 F. Supp.2d 1318, 1323 (S.D. Fla. 2006). Similarly, the Court finds here that the Plaintiffs do not meet this criterion. Thus, the treaty does not require that Plaintiffs' choice of forum be given substantial deference. However, even given this consideration, the Court finds that the private and public interest factors weigh in favor of maintaining the action in the United States.

> practical problems that make trial of a case easy, expeditious and inexpensive.

Piper Aircraft, 454 U.S. at 241 n. 6.

Defendants argue that the following private interest factors weigh in favor of dismissal; (1) WCA's absence from the present action; (2) litigating in Colombia would provide greater access to evidence; (3) the fact that this court cannot compel liability evidence or third party damages evidence; (4) litigating the crew member claims in the United States would cause Defendants to defend litigation arising out of the same accident simultaneously in multiple forums, (5) the existence of ongoing Colombian litigation; (6) all relevant documents and witnesses within Defendant's control would be made available by Defendants in Colombia. (*See* D.E. 245 at 10-16.)

The court begins its consideration of the private interest factors by noting that, in sum and substance, the Amended Complaint asserts product liability claims relating to the construction and maintenance of the subject aircraft and its engines, as well as negligence claims (failure to warn) relating to the aircraft's condition of disrepair while it was in Defendants' custody and control in the United States. The companies that owned, operated and maintained the aircraft and supplied its engine parts for at least nineteen years prior to the accident are located in the United States. Indeed, it appears the subject aircraft was in use overseas for only about one month prior to the crash. Additionally, the accident occurred not in Colombia, but in Venezuela. Thus, while some relevant liability evidence may be in the possession of WCA and other third parties in

Colombia and other important liability evidence may be in Venezuela, the majority of the evidence pertaining to the construction, maintenance, and repair of the subject aircraft and its engine parts is most likely located in the United States.

While this imbalance is addressed to a degree by Defendants' willingness to make their current employees available to testify in Colombia, Defendants cannot ensure that all of the critical liability evidence is in its possession or control given the lengthy history associated with the aircraft. For example, there surely will be former employees with knowledge of the construction and maintenance of the aircraft and the engine parts, and employees of other entities, such as ASI, which were involved with the aircraft over whom Defendants will have no control. Accordingly, Plaintiffs are far more likely to be able to secure the appearance of all relevant liability witnesses if the case is heard in a United States court.

As for documents, Defendants represent that they will make whatever documents are in their possession or control available in Columbia. However, Defendants concede that all of the manufacturing specifications, other technical documents and the maintenance records are in English and this court only can presume that they are voluminous. While Defendants seek to minimize this problem by suggesting that only a small portion would have to be translated in order to support expert affidavits, it seems more likely to the undersigned that a Colombian court would require that all documents with evidentiary value be translated into Spanish. The translation of these types of documents can be unreliable and contro-

versial. Also, the translation would cause substantial delay and be exceedingly expensive. Additionally, there likely are documents in the possession of third parties, such as ASI, that could be critical to the Plaintiffs' case that could be difficult for Plaintiffs to obtain if this matter were litigated in Colombia and which Plaintiff would need to translate for presentation to a Colombian court.

Defendants make much of the fact that some liability evidence will be located in Colombia, such as WCA's records and witnesses regarding the aircraft. However, given that the aircraft was only in WCA's possession for about one month prior to the crash and that it appears that WCA's crews may have been trained locally, such evidence is bound to be scant in comparison to the volume of records generated during the nineteen years that the aircraft was residing in the United States. Therefore, to the extent such evidence is located in Colombia, the burden on Defendants from having to employ letters rogatory to obtain it will be less than if Plaintiffs are required to rely on such devices to obtain critical liability evidence from the United States for presentation in a Colombian court. In this regard, the court concedes that letters rogatory are expensive and inefficient; but it appears that in this case they are unavoidable; there simply is no perfect forum since the accident occurred in Venezuela, the aircraft was manufactured and maintained for most of its history in the United States, the crew was Colombian and the flight was chartered out of Florida.

As for damages evidence, family members, heirs and survivors of the crew members, WCA employ-

ment records, Plaintiffs' medical records and other records relating to claims for economic losses are most likely located in Colombia. However, much of this evidence is in Plaintiffs' control and, because Plaintiffs have the greater interest in pursuing the case to conclusion, the court anticipates that Plaintiffs will voluntarily produce much of the damages evidence in the United States. The balance presumably can be obtained through letters rogatory. In any event, due to the breadth of Plaintiffs' product liability and negligence claims, the availability of liability witnesses and documents in the United States outweighs the lack of availability in the United States of some liability and damages evidence that will have to be accessed from Colombia.

Finally, the court is not persuaded by Defendants' argument that the absence of WCA would prejudice their defense at trial or cause incomplete or fragmented adjudication of the present case. As Plaintiffs' point out, Florida law permits Defendants, as an affirmative defense, to attribute tort liability to a party who is absent from the litigation. *See Fabre v. Marin*, 623 So.2d 1182, 1185 (Fla. 1993); *See* Fla. Stat. § 768.81. Due to the availability of this affirmative defense, Defendants actually may enjoy an advantage from WCA's absence during a jury's determination of liability. Moreover, if Colombia is an available and adequate forum, as Defendants contend, it is plausible that at the close of the litigation, Defendants, if found liable, could pursue contribution from WCA in Colombia. As to the two Plaintiffs' civil actions in Colombia against the Special Administrative Unit of Civil Aeronautics of

Colombia, the disposition of these actions is disputed, and the court is unable to conclude from their existence that litigation of this case in the United States would cause fragmented or duplicative litigation or pose a risk of inconsistent adjudications, particularly since it does not appear that any of the Defendants herein have been named as parties in those lawsuits.

In sum, after carefully considering the arguments of the parties, the court finds that the private interests factors do not weigh in favor of dismissal. The undersigned concludes that if Plaintiffs' claims against Defendants are permitted to proceed in this court, the parties, by and large, will have greater access to important witnesses and documents and the procurement and presentation of relevant evidence will be less costly and more efficient.

iii. *Public Interest Factors*

The public interests factors to be considered include:

> The administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws; or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Piper Aircraft, 454 U.S. at 241 n.6

With respect to the public interest factors, Defendants argue only that Colombia has a greater interest in the litigation to that of Florida or the United States as a whole, that litigation in this court would impose an undue administrative burden, and that dismissal of the action on *forum non conveniens* grounds would avoid unnecessary conflict of law problems. (*See* D.E. 296 at 9-10.) Accordingly, the court will only address these three factors.

First, although Colombia has a strong interest in adjudicating this lawsuit because it involves injuries to its citizens, the United States generally has a strong interest in assuring that United States manufacturers and airlines do not produce defective products or engage in conduct that endangers users wherever located. Additionally, the United States has a direct and specific interest in this particular case since the allegedly defective aircraft was used to charter U.S. residents for nearly nineteen years; on the other hand, WCA only had control of the aircraft for one month and, even then, it was used to ferry passengers between locations outside of Colombia.[4] Therefore, the court finds that the United States has a substantial interest in the outcome of this litigation that is not heavily outweighed by

[4] This court also agrees with Plaintiffs that Florida has a significant interest in the case being litigated in this district since it appears that Newvac arranged the charter from Florida, Newvac purchased replacement parts for the aircraft for WCA from Florida companies, ASI, which is based in Ft. Lauderdale, inspected and evaluated the aircraft at the end of Continental's lease, and WCA may have trained its pilots in Florida.

Colombia's interest. Accordingly, the Court finds this public interest factor does not weigh in favor of dismissal.

Next, the Defendants have not demonstrated that the administrative burden posed by this case would be excessive. This case is not like *Nolan v. Boeing Co.*, 762 F. Supp. 680 (E.D. La. 1989) which involved more than 100 plaintiffs. Instead, this case involves eight wrongful death claims against U.S. domiciled defendants and concerns an aircraft which was resident in the United States for nineteen years prior to the crash. While the litigation of these claims undoubtedly will be complex, Defendants have failed to make a persuasive case that the complexities will exceed other large, complex product liability cases that have been tried to conclusion in this district.

Finally, with respect to the interest in the avoidance of conflict of laws issues, the Eleventh Circuit has held that "[w]hile the application of foreign law is an important factor to be considered in weighing the public interests factors, this factor cannot be accorded dispositive weight." *Sme Racks, Inc. v. Sistemas Mecanicos Para Electornic, SA*. 382 F.2d 1097, 1104 (11th Cir. 2004.) In any event, it is unclear at this juncture whether there will be any actual conflict between Colombian law and United States law on the issues of liability and damages necessitating a choice of law analysis. With respect to the capacity of the Plaintiffs to pursue claims on behalf of decedents, there likely will be a need to apply foreign law; but this court is frequently called upon to make such determinations in international air crash cases.

Accordingly, the public interest factors identified by Defendants do not weigh in favor of dismissal of this case to Colombia.

Based on the foregoing, it is hereby,

ORDERED AND ADJUDGED, Defendant's Motion to Dismiss Plaintiffs' Third Amended Complaint pursuant to the doctrine of *forum non conveniens* is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 13 day of May 2009.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided:
counsel of record

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 06-22748-UNGARO

IN RE: WEST CARIBBEAN AIRWAYS, S.A.,
a Colombian corporation, et al.

ORDER TO CLARIFY ORDER OF DISMISSAL

THIS CAUSE is before the Court upon Plaintiffs' Motion To Clarify this Court's Order Granting Defendants' Motion to Dismiss for *Forum non Conveniens* to clarify the imposition of conditions on the parties that are contemplated prerequisites to this Court's dismissal of the above action on the grounds of *forum non conveniens*. (D.E. 184)

THE COURT has considered the motion, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED that Defendants' Motion (D.E. 159) is GRANTED, subject to the following conditions. The Defendants must 1) submit to the jurisdiction of, and accept service of process from, the courts of Martinique; 2) waive any statute of limitations arguments respecting the

refiling of the actions in Martinique, (D.E. 184); and 3) agree that damages sought are governed by Article 21(1) of the Montreal Convention, and that they will not resort to the defenses provided for in Article 21(2);

The parties have stipulated that the concessions of the Defendants are binding and shall be considered a condition of the Order of Dismissal provided that the Plaintiffs' in these consolidated actions, or the beneficiaries on whose behalf they are brought, recommence their actions in Martinique, France within six (6) months of the date of this order. Moreover within fourteen (14) days of this Order, Plaintiffs shall file and serve upon opposing counsel a complete list of all the beneficiaries whom they represent in these consolidated matters, unless such names have previously been specifically and fully incorporated in the Amended Complaint(s) filed herein.

DONE AND ORDERED in Miami, Florida, this 7 day of December, 2007.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES DISTRICT JUDGE

Copies provided
cc:Counsel of record

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 06-22748-CIV-UNGARO
(Filed Nov. 13, 2007)

IN RE: WEST CARIBBEAN AIRWAYS, S.A., *et al.*,

Defendants.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS ON GROUNDS OF FOR [sic] FORUM NON CONVENIENS

THIS CAUSE is before the Court upon Defendants' Motion to Dismiss on Grounds of *Forum Non Conveniens*. D.E. 159. The Court has considered the Motion and is otherwise fully advised in the premises.

a. Facts

These consolidated actions arise out of the August 16, 2005 airplane crash in Venezuela of West Caribbean Airways flight 708, while en route from Panama to Martinique. Plaintiffs are, and the decedents were, residents of Martinique, a

Department of the Republic of France. *See* D.E. 152 (Am. Compl.) at ¶¶ 7, 74.[1] Defendant West Caribbean Airways, S.A. is a Colombian corporation with offices in Medellin, Colombia. *Id.* at ¶ 9. Defendants Newvac Corporation and Go 2 Galaxy, Inc. are Florida corporations. *Id.* at ¶ 15.[2]

On March 15, 2005, Newvac entered into a "charter contract" with West Caribbean Airways in Medellin, Colombia, pursuant to which West Caribbean was to provide a 152-passenger MD-81 aircraft and crew, for charter flights occurring during May, July and August 2005. *See* D.E. 99 (McCune Decl.), Ex. "5" (English translation of Charter Contract, originally in Spanish, executed by Jacques Cimetier on behalf of Newvac, d/b/a Go-2 Vacations). Thereafter, on April 25, 2005, Newvac entered into a "contract for air chartering" with Globe Trotter Agency, a travel agency in

[1] It is undisputed that all but one of the decedent passengers were French nationals. *See* D.E. 159 (Mot.) at 2. This one decedent was an Italian national residing in Martinique. *Id.* n. 3.

[2] The Galbert Plaintiffs sued an additional Defendant, Aseguradora Colseguros, S.A., a Colombian corporation alleged to be the liability insurer of the aircraft at issue. *See* D.E. 152 (Am. Compl.) at ¶ 16. On March 7, 2007, Plaintiffs moved for a 120 day extension of time within which to serve Aseguradora Colseguros. *See* D.E. 38 (Mot.). The Court granted Plaintiffs' Motion. *See* D.E. 51 (Order). The 120-day extension of time expired on or about July 6, 2007, and Plaintiffs neither moved to extend the deadline nor filed proof of service on this Defendant. *See* Fed. R. Civ. P. 4(1). Therefore, the Court dismisses Aseguradora Colseguros without prejudice due to Plaintiffs' failure to effect service of process within the time allotted by the Court's Order. *See* Fed. R. Civ. P. 41(b).

Martinique, whereby Newvac agreed to provide the aircraft it chartered from West Caribbean to Globe Trotter for a series of excursions between Martinique and Panama. *See* D.E. 99 (McCune Decl.), Ex. "7" (English translation of Charter Contract, originally in French, executed by Jacques Cimetier on behalf of Newvac, d/b/a Go-2 Vacations). Newvac also provided Globe Trotter with the hotel, transportation and "sightseeing" for these excursions. *See* D.E. 145 (Cimetier Depo.) at 185:6186:4. One hundred fifty two (152) passengers and eight (8) crew members were killed while on one of the excursions sold by Globe Trotter when West Caribbean's aircraft crashed over Venezuela on a return trip from Panama. *See* D.E. 152 (Am. Compl.) at ¶¶ 31-33, 41, 52, 66, 75.[3]

Plaintiffs bring this action pursuant to the Montreal Convention. *Id.* at ¶ 3.[4] Where applicable, the Convention exclusively governs the rights and liabilities of passengers and carriers in international air transportation.[5] On September 26, 2007, the Court issued its Preliminary Order on Defen-

[3] *See* Brian Ellsworth, *Airline Crash in Venezuela Kills 160* (visited October 31, 2007) <http://www.npr.org/templates/story/story.php?storyId=4802464>.

[4] The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999 (entered into force on Nov. 4, 2003), *reprinted in* S. Treaty Doc. No. 106-45, 1999 WL 33292734 (hereinafter "Montreal Convention").

[5] *See El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 161, 174 76 (1999) (addressing the Warsaw Convention, predecessor of the Montreal Convention); *Kruger v. United Airlines, Inc.*, 481 F. Supp. 2d 1005, 1008 (N.D. Cal. 2007); *Onwuteaka v. Northwest Airlines, Inc.*, No. H-07-0363, 2007 WL 1406419, *1 (S.D. Tex. May 10, 2007).

dants' Motion to Dismiss on Grounds of Forum Non Conveniens. D.E. 165. The Court found that Defendant "Newvac is a 'contracting carrier' pursuant to Article 39 of the Montreal Convention and that the doctrine of *forum non conveniens is* applicable in this proceeding pursuant to Article 33(4) of the Montreal Convention." *Id.* at 49. After allowing the parties to fully brief the issue (*id.*), the Court now proceeds to determine whether the actions should be dismissed on *forum non conveniens* grounds.

b. *Forum Non Conveniens*

A party moving to dismiss an action on the basis of *forum non conveniens* "must demonstrate that (1) an adequate alternative forum is available, (2) the public and private factors weigh in favor of dismissal, and (3) the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice. . . ." *Leon v. Million Air, Inc.*, 251 F.3d 1305, 1311 (11th Cir. 2001) (internal citations and quotation marks omitted). With respect to the second prong of the analysis, "balancing private interests requires determining the convenience of the parties, affording domestic plaintiffs a strong presumption that their forum choice is sufficiently convenient, and a weaker presumption applying in cases brought by foreign plaintiffs." *Id.* Further, although private interest factors are generally considered more important than public interest factors, a court should consider both in its analysis. *Id.*

c. Plaintiffs' Argument

It should be obvious from the facts outlined above that the actions now pending before the Court present a strong case for *forum non conveniens* dismissal. The substance of Plaintiffs' argument in opposition is that the actions should not be dismissed given Defendants' likely assertion of third-party claims for contribution against, *inter alia*, U.S.-based manufacturers. *See, e.g.*, D.E. 170 (Pls.' Resp.) at 1-3, 6, 10-12.[6] According to Plaintiffs, the addition of these claims will require significant litigation regarding the apportionment of liability. *Id.* Thus, Plaintiffs suggest superimposing the *forum non conveniens* analysis respecting the potential third-party claims over the *forum non conveniens* analysis applicable to the claims which actually are at issue herein. *Id.* The Court is not persuaded.

Plaintiffs have not cited, and the Court has not found, cases wherein courts have followed the analytical approach Plaintiffs propose. Plaintiffs cite *Piper Aircraft v. Reyno*, 454 U.S. 235, 259 (1981),

[6] Article 37 of the Montreal Convention provides: "Nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against any other person." Defendants submit that Plaintiffs' argument is extraneous to the issues before the Court and that therefore, they should not have to concede that they will not pursue third-party claims. *See* D.E. 170 (Pls.' Resp.) at 3 n. 2. Nevertheless, Defendants represent that Defendant West Caribbean bears full financial responsibility to the passengers, as it was the actual carrier. *Id.*; D.E. 180 (West Caribbean's Reply) at 2-3. Thus, West Caribbean represents that it does not intend to assert any third-party claims in Martinique. *Id.*

where, in discussing the private interest factors, the Supreme Court noted that the district court had "correctly concluded that the problems posed by the inability to implead potential third-party defendants clearly supported holding the trial in Scotland." *Id.*[7] The Supreme Court observed that:

> Joinder of the pilot's estate, [the aircraft's owner], and [the aircraft's operator] is crucial to the presentation of [the manufacturers'] defense. If [the manufacturers] can show that the accident was caused not by a design defect, but rather by the negligence of the pilot, the plane's owners, or the charter company, they will be relieved of all liability. It is true, of course, that if [the manufacturers] were found liable after a trial in the United States, they could institute an action for indemnity or contribution against these parties in Scot-

[7] The district court had determined that it would be unfair to make the defendants, U.S. manufacturers of aircraft parts, proceed to trial in the U.S. "because crucial witnesses and evidence [of the aircraft crash] were [in Scotland] beyond the reach of compulsory process, and because the defendants would not be able to implead potential Scottish third-party defendants." *Id.* at 242 (citing *Reyno v. Piper Aircraft Co.*, 479 F. Supp. 727, 733 (M.D. Pa. 1979)). The district court recognized that even if the trial was held in the United States, the manufacturers could thereafter file indemnity or contribution actions against the Scottish defendants in Scotland. *Id.* at 243 (citing *Reyno*, 479 F. Supp. at 733). However, the district court found that there was a significant risk of inconsistent verdicts based on the differing standards of liability applicable in the U.S. and Scotland, and the danger that different juries would find different facts and produce inconsistent results. *Id.* n. 7.

> land. It would be far more convenient, however, to resolve all claims in one trial.

Id. (internal citation omitted).

The foregoing language supports consideration, as part of the private interest factors, of a defendant's argument that a plaintiff 's chosen forum would preclude the defendant from impleading other alleged tortfeasors.[8] In this case, however, it is Defendants who propose Martinique as an alternative forum. They have no doubt considered the advantages and disadvantages of defending themselves therein. Significantly, there is no argument that the U.S.-based entities Plaintiffs refer to cannot be impled [sic] in Martinique.[9] Moreover, Plaintiffs do not persuasively argue that *their* actions will be prejudiced if Defendants elect to file third-party claims in Martinique.[10] Therefore,

[8] It is also more convenient to resolve all claims in a single proceeding (*id.*), which avoids the potential for inconsistent results. *Id.* at 243.

[9] Indeed, the "Bapte" Plaintiffs acknowledge filing suit against these entities in Martinique, albeit as an alleged protective measure because Defendant West Caribbean allegedly evaded service of process in this action. *See* D.E. 170 (Pls.' Resp.) at 20.

[10] Plaintiffs cursorily submit that if the actions are tried in Martinique they will litigate claims against the U.S. manufacturers under U.S. law, while if the actions remain here, they will not. *See* D.E. 170 (Pls.' Resp.) at 5. This argument, purportedly based on the Hague Convention on the Law Applicable to Products Liability, is devoid of any details that would allow the Court to weigh its validity and significance, if any. *Id.* The Court finds Plaintiffs' contention wholly unpersuasive where they have not sued the manu-

the Court will consider the potential thirdparty claims in the context of the private and public interest factors, as such consideration does not alter the Court's ultimate determination. The Court notes, however, that in the instant cases Plaintiffs' arguments concerning the Defendants' ability to implead third parties do not carry the same weight as when a defendant claims prejudice from its inability to implead potential tortfeasors. *See, e.g., Kilvert v. Tambrands Inc.*, 906 F. Supp. 790, 795-96 (S.D.N.Y. 1995); *Morse v. Sun Intern. Hotels, Ltd.*, No. 98-7451Civ, 2001 WL 34874967, *4 (S.D. Fla. Feb. 26, 2001).

d. Alternative Forum

The moving party must demonstrate the availability *and* adequacy of an alternative forum. *See Leon*, 251 F.3d at 1311. Generally, an alternative forum is available if the moving party shows that it is amenable to process in that forum or if it consents to the jurisdiction of the alternative forum. *Id.; Reyno*, 454 U.S. at 242, 254 n.22; *Satz v. McDonnell Douglas Corp.*, 244 F.3d 1279, 1282-83 (11th Cir. 2001); *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1429 (11th Cir. 1996). In this case Defendants stipulate that if the Motion is granted, they will submit to the jurisdiction of, and accept service of process from, the courts of Martinique. *See* D.E. 159 (Motion) at 2, 12, 25; D.E. (168) (Resp. to Court Order). Thus, the Court finds that Martinique is an available forum.

facturers in this forum and offer no explanation why dismissing the actions to Martinique would suddenly compel them to pursue those actions therein.

With respect to "adequacy," the alternative forum need not perfect. *See Leon*, 251 F.3d at 1311. "Courts have been strict about requiring that defendants demonstrate that the alternative forum offers at least some relief." *Id.* Defendants have submitted the declaration of French attorney Maylis Casati-Ollier, who has practiced in the area of aviation law for more than 30 years. *See* D.E. 162 (Casati-Ollier Decl.) at ¶¶ 1, 5. Ms. Casati-Ollier advises that in the French judicial system, a "*Tribunal de Grande Instance*" ("*TGI*") has exclusive jurisdiction over actions arising under the Montreal Convention. *See* D.E. 162 (CasatiOllier Decl.) at ¶¶ 6-8. There is a TGI in Fort-deFrance, Martinique, and pursuant to Article 33 of the Montreal Convention, it may entertain Plaintiffs' actions and award damages. *Id.* at ¶¶ 8, 17, 19-21. Thus, the Court has no reason to doubt that Martinique is an adequate forum. In fact, Plaintiffs do not dispute this element of the *forum non conveniens* analysis.

Nevertheless, the Court addresses Plaintiffs' suggestion, in their discussion of the public interest factors, that the actions would proceed inefficiently in Martinique because there is only one four-chamber court therein. *See* D.E. 170 (Pls.' Resp.) at 22.[11] These intimations are insufficient to raise an issue as to the adequacy of a forum. Where inefficiency is alleged "defendants have the ultimate burden of persuasion, but *only* where the

[11] The TGI in Martinique is "composed of four 'sections', each of the first three integrated by three magistrates and the fourth composed by a single Judge." *See* D.E. 171 (Belleeave Decl.) at ¶ 16.

plaintiff has *substantiated his allegations of serious . . . delay.*" *Id.* at 1312 (emphasis added).[12] Plaintiffs' allegations fail to substantiate an argument of inadequacy based on the inefficiency of Martinique's judicial system. *Id.*; cf. D.E. 171 (Bellecave Decl.) at ¶¶ 16-18. Therefore, based on the uncontested declaration of Ms. Casati-Ollier, the Court finds that Martinique is an adequate forum to adjudicate these actions.

c. Private Interest Factors[13]

First, although "there is normally a strong presumption that the plaintiff has chosen a sufficiently convenient forum," this presumption weakens "when the plaintiff is a foreigner litigating far from home." *Id.* at 1314-15. As previously noted, Plaintiffs are, and the decedents were, residents of Martinique; none of them are (were) U.S. citizens. Therefore, the presumption

[12] "Thus, where the allegations are insubstantially supported . . . a District Court may reject them without considering any evidence from the defendant. But where the plaintiff produces significant evidence documenting . . . delay (in years) typically associated with the adjudication of similar claims, and these conditions are so severe as to call the adequacy of the forum into doubt, then the defendant has the burden to persuade the District Court that the facts are otherwise." *Id.*

[13] "'Private interests' include . . . 'ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses . . . and all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Leon*, 251 F.3d at 1314 (quoting *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947)).

that Plaintiffs have chosen a sufficiently convenient forum in filing suit in the Southern District of Florida is entitled to less deference in this case. *See Leon*, 251 F.3d at 1315.[14]

With respect to ease of access to sources of proof, the Court finds that this factor favors Martinique over the United States. The parties agree that with respect to the Montreal Convention claims, Defendants' liability will not be at issue. *See* D.E. 163 (Counsel for Cimetier Defs.' Decl.) at ¶ 5; D.E. 170 (Pls.' Resp.) at 2; D.E. 179 (Cimetier Defs.' Reply) at 1; D.E. 180 (West Caribbean's Reply) at 2-3.[15] Thus, the principal contention between the parties herein will be the amount of damages to which each Plaintiff is entitled. In this

[14] The court is not persuaded by Plaintiffs' argument that they should be accorded "deference that is *equal* to that accorded to U.S. residents" because: (1) they have sued in one of the negotiated fora provided for in the Montreal Convention, or (2) as a matter of comity towards France. *See* D.E. 170 (Pls.' Resp.) at 12-13. The greater deference accorded to a U.S. resident follows from the reasonable assumption that a plaintiff choosing her home forum does so because it is convenient. *See Reyno*, 454 U.S. at 255-56. This assumption is not otherwise warranted. *Id.*; *cf. Pollux Holding Ltd. v. Chase Manhattan Bank*, 329 F.3d 64, 72-73 (2d Cir. 2003) (declining to afford the Liberian plaintiffs' forum choice the same deference afforded to a U.S. citizen's forum choice where the pertinent treaty did not grant Liberian nationals access to U.S. courts on terms no less favorable than those applicable to U.S. nationals).

[15] If the Motion is granted, Defendants are conceding that the damages sought are governed by Article 21(1) of the Montreal Convention, and will not resort to the defense available under Article 21(2). *See* D.E. 159 (Motion) at 15; D.E. (168) (Resp. to Court Order).

regard, Plaintiffs concede that "most if not all of the damages evidence is found in Martinique." D.E. 170 (Pls.' Resp.) at 15. Accordingly, evidence pertinent to the issue of damages – including the decedents' medical, employment and financial records, as well as testimony from the decedents' relatives, employers and physicians – will be more conveniently examined (both during discovery and at trial) in Martinique. To the extent that any of these records and witnesses are not willingly produced, this Court would not be able to *compel* their production and attendance. *See, e.g., Magnin*, 91 F.3d at 1430.[16] Even for those documents and witnesses that are available on a voluntary basis, the cost of producing them in this country, presumably in translated form, weighs in favor of litigation in Martinique. *Id.*[17]

[16] "Other factors that indicate France is the better forum for litigation of this case include the unavailability of compulsory process to secure attendance of French witnesses in a court in this country. . . ." *Id.* Plaintiffs suggest that this Court has treaty power to direct subpoenas to France, which would be served pursuant to the Hague Convention on Service Abroad, 20 U.S.T. 361. *See* D.E. 170 (Pls.' Resp.) at 18 (citing 28 U.S.C. §§ 1369, 1785, and referring to the Hague Evidence Convention (28 U.S.C. § 1781 note)); D.E. 171 (Bellecave Decl.) at ¶ 19. The Hague Conventions operate on the basis of letters of request, which are impractical in the instant actions given the number of potential records and witnesses, and that letters of request are notoriously time-consuming. *See Strategic Value Master Fund, Ltd. v. Cargill Fin. Servs. Corp.*, 421 F. Supp. 2d 741, 768-69 (S.D.N.Y. 2006).

[17] The Court notes that Plaintiffs have offered to bear the cost of "bring[ing] to trial" fact witnesses as to damages. *See* D.E. 170 (Pls.' Resp.) at 20. While this alleviates some of

Plaintiffs also refer to Defendants' potential claims for contribution against U.S. manufacturers. *See supra* part c. As to these potential third-party defendants, it is undisputed that evidence pertaining to claims sounding in products liability will be located in the United States, not in Martinique.[18] Plaintiffs do not contend, however, that the U.S. manufacturers cannot be impled [sic] in an action in Martinique. Plaintiffs have not shown that if the U.S. manufacturers are made parties to the action as Plaintiffs contemplate, evidence in the possession and/or control of the U.S. manufacturers will not be available in a proceeding in Martinique. *Cf., e.g.*, D.E. 162 (Casati-Ollier Decl.) at ¶¶ 10-15 (outlining the procedures available under the French judicial system to, *inter alia*, ensure the parties' production of evidence). In this regard, the private interest considerations in the instant cases are indistinguishable from those in

Defendants' potential costs, the offer does not extend to the expensive proposition of conducting discovery respecting non-party witnesses in Martinique, which can be expected to include travel, lodging, and translation costs.

[18] According to Plaintiffs, there is evidence that the aircraft's systems that monitored and controlled engine power were deficient. In this regard, Plaintiffs identify the Boeing Company, successor to the aircraft's manufacturer, McDonnell Douglas, as a potential third-party Defendant. *See* D.E. 170 (Pls.' Resp.) at 6 (also noting the absence of a "stick pusher" device that would aid in the recovery from an aerodynamic stall). Plaintiffs also cite deficiencies in the engines and identify the engines' manufacturer, Pratt and Whitney, in this regard. *Id.* Finally, Plaintiffs identify Honeywell Bendix, manufacturer of the aircraft's weather radar, as another potential third party defendant. *Id.* Plaintiffs submit that the records pertinent to these components are located in the United States. *Id.* at 16.

numerous cases in which *forum non conveniens* dismissals have been granted in products liability actions against U.S. aircraft and part manufacturers. *See, e.g., Reyno*, 454 U.S. 235; *Magnin*, 91 F.3d 1424; *Satz*, 244 F.3d 1279. Thus, while ease of access to the manufacturers' evidence would be greater in this forum (*see Reyno*, 454 U.S. at 257), the Court finds that this factor is of lesser concern when compared to the inconvenience of accessing evidence pertaining to damages, in Martinique, respecting more than a hundred decedents and their beneficiaries.

Moreover, it is important to note that the private interest considerations are intended to address the convenience of the parties. *See Leon*, 251 F.3d at 1311. As previously noted, it is Defendants who seek dismissal of this action in favor of Martinique. Thus, if Defendants decide to assert third party claims against the U.S. manufacturers in Martinique, Defendants will be the parties prejudiced by any inconvenience related to accessing third-party liability evidence in the United States or elsewhere. Again, Plaintiffs have not established that *they will* be inconvenienced by the potential litigation against the U.S. manufacturers in Martinique. *See supra* n. 10. Plaintiffs have not filed actions in this forum against the U.S. manufacturers and the Court is not convinced by Plaintiffs' bare assertion that if the actions are taken to Martinique they will do so therein. *Id.*

Plaintiffs also refer to non-party liability evidence located in Colombia, Venezuela[19] and

[19] As previously noted, West Caribbean's aircraft crashed in Venezuela. However, the location of the accident,

Panama. *See* D.E. 170 (Pls.' Resp.) at 16-17, 18. However, Plaintiffs concede that "the court in Martinique will be no better at compelling the production of evidence from those countries than this Court will." *Id.* at 17. Therefore, this factor does not favor either forum.

Plaintiffs further contend that "[t]he burden of translating relatively simply [sic] damages evidence into English is far outweighed by the burden that would be imposed if all the liability evidence, in English and Spanish, had to be translated into French." *Id.*[20] However, Plaintiffs do not contend that this burden will be theirs to bear. Under Plaintiffs' contemplated scenario – *i.e.* Defendants suing U.S. manufacturers for contribution in Martinique – Plaintiffs' argument is not persuasive; Defendants and the U.S. manufacturers would incur these costs.

Plaintiffs also make brief general references to: (1) FAA and NTSB records in Washington pertaining to the certification and safety of U.S.-made aircraft and component parts; and (2) government accident investigators in the United States. *See* D.E. 170 (Pls.' Resp.) at 16, 18.[21] How-

by itself, is not one of the "jurisdictions" where an action for damages under the Montreal Convention may be brought. *See* Montreal Convention, art. 33.

[20] According to Plaintiffs "liability evidence consists of highly technical documents and testimony that often are hard to understand, even by native speakers." *Id.*

[21] There is no indication that the accident at issue is being investigated by the NTSB. "The investigation is being conducted by the Venezuela Comite de Investigacion de Accidentes Aereos." *See* <http://www.ntsb.gov/ntsb/GenPDF.asp?id=DCA05RA093&rpt=fa> (NTSB Factual Report) (visited October 31, 2007).

ever, Plaintiffs have not explained the extent to which such evidence is public information or would require the issuance of compulsory process. Plaintiffs, thus, have not shown that this type of evidence will be less accessible in Martinique.

In sum, even after according Plaintiffs the deference they are due, and considering the potential third-party claims, the private interests in these actions weigh in favor of Martinique.

f. Public Interest Factors[22]

The public interest factors also weigh in favor of Martinique. The decedents were residents of Martinique and the relief sought in each of the consolidated actions is a damages award that will benefit residents of Martinique. The Court finds that when compared to this forum, Martinique has a superior interest in the adjudication of actions that seek to redress injuries to a significant number of its residents. The interest of this forum relates to the conduct of Newvac, and potentially, the U.S. manufacturers. *See, e.g.*, D.E. 170 (Pls.' Resp.) at 5-6, 24-25 (describing Newvac's conduct), 6 (describing the manufacturers' conduct). While the Court appreciates that this forum has an interest in deterring the alleged tortious conduct of these and similar entities, this interest cannot be equated to that of Martinique, whose residents

[22] "Public interest factors 'include the sovereigns' interests in deciding the dispute, the administrative burdens posed by trial, and the need to apply foreign law.'" *Membreno v. Costa Crociere S.p.A.*, 425 F.3d 932, 937 (11th Cir. 2005) (quoting *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 953 (11th Cir. 1997)).

have been the ones affected by the immediate and tangible impact of the deaths at issue. *See, e.g., Gilbert*, 330 U.S. at 509 ("In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home."). Further, the deterring impact that a damages award may have cannot be said to be greater if the actions are pursued in this forum. *See, e.g., Reyno*, 454 U.S. at 260-61.

Moreover, from an administrative standpoint, "[t]he American interest in this accident is simply not sufficient to justify the enormous commitment of judicial time and resources that would inevitably be required if the case were to be tried here." *Id.* at 261. It is the Court's experience that live testimony given in a foreign language demands significantly more time from the Court given that the questions and answers need to be translated, and often times repeated. These actions likely will involve the presentation of live testimony and documentary evidence on damages relating to more than a hundred decedents and their beneficiaries. The Court acknowledges that if third-party U.S. manufacturers are impled [sic], live testimony on the liability portion of the proceedings would be more conveniently handled by this Court. However, the parties are in agreement that the TGI in Martinique will not hear live testimony; "parties, witnesses and experts appear only through written briefs." D.E. 171 (Bellecave Decl.) at ¶ 15; *accord* D.E. 162 (Casati-Ollier Decl.) at ¶ 10. Thus, although both fora face the potential

submission of translated testimony and documents, only the participants in trials in this Court would have to assume the burden of live contemporaneous translations. A trial in this forum would burden members of this community with jury duty under these circumstances, where, as already noted, the most significant interests are those of Martinique. *Cf. id.* at ¶ 8 (jury trial is unavailable in Martinique).

Finally, Defendants submit that if the actions remain here the Court would need to apply French law. *See* D.E. 159 (Motion) at 23-25. Plaintiffs posit, however, that assuming Defendants are correct, the Court would only need to apply French law as to damages and that French law is not much different than Florida law. *See* D.E. 170 (Pls.' Resp.) at 25-26. Plaintiffs submit that in contrast, if the third-parties are sued in Martinique, those claims would be governed by the laws of each of the U.S. manufacturers' domicile states. *Id.* at 26 (citing to the Hague Convention on the Law Applicable to Products Liability). If Plaintiffs are correct,[23] this factor would weigh in favor of this forum. However, this factor is not dispositive[24] and, on balance, the public interest factors favor Martinique.

[23] The Court finds the parties' filings on the choice of law issue insufficient to make a reasoned determination on whether and to what extent either forum would need to apply foreign law. However, this factor does not alter the Court's determination, even after assuming that Plaintiffs are correct.

[24] *See SME Racks, Inc. v. Sistemas Mecanicos Para Electronica, S.A.*, 382 F.3d 1097, 1104-05 (11th Cir. 2004).

g. Reinstatement of Suit

The Court must consider whether "the plaintiff can reinstate his suit in the alternative forum without undue inconvenience or prejudice." *Leon*, 251 F.3d at 1311. As previously noted, Defendants stipulate that if the Motion is granted, they will submit to the jurisdiction of, and accept service of process from, the courts of Martinique. *See* D.E. 159 (Motion) at 2, 12, 25. Further, Defendants are waiving any statute of limitations defenses. *Id.*; D.E. (168) (Resp. to Court Order).[25] It is undisputed that some Plaintiffs have already commenced proceedings against West Caribbean and its insurer, as well as American manufacturers, in Martinique. Moreover, Plaintiffs do not argue that they will be unable to reinstate their actions in Martinique, or that they will be unduly inconvenienced or prejudiced in doing so. Therefore, the Court is satisfied that Plaintiffs will be able to reinstate their suit in Martinique, and that they will be able to do so "without undue inconvenience or prejudice." *Leon*, 251 F.3d at 1311. Accordingly, it is

ORDERED AND ADJUDGED that Defendants' Motion (D.E. 159) is GRANTED. The actions specified *infra* are dismissed on the basis of *forum non conveniens*, without prejudice to their refiling in Martinique, France. It is further

[25] According to Ms. Casati-Ollier, "there is nothing [under French law] that prohibits the defendant from waiving the benefit of the limitation period of Article 35 of the Montreal Convention in a specific case." D.E. 162 (Casati-Ollier Decl.) at ¶ 23.

ORDERED AND ADJUDGED that Defendant Aseguradora Colseguros is dismissed without prejudice. *See supra* n. 2.

DONE AND ORDERED in Chambers at Miami, Florida, this 9 day of November 2007.

/s/ Ursula Ungaro
URSULA UNGARO
UNITED STATES DISTRICT JUDGE